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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MARGARET SPAULDING, *et al.*,
Petitioners,

v.

UNIVERSITY OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether disparate impact analysis may be applied to a sex-based wage discrimination suit where an employer alleges that wage disparities between petitioners and their comparators in other faculty departments are the result of its policy of paying "market rates."

2. Whether the quantity and quality of a showing of intentional sex-based wage discrimination under a disparate treatment analysis should vary in inverse proportion to the degree of job comparability shown.

3. Whether Article III of the Constitution and the United States Magistrates Act require the district court to engage in a *de novo* review of the record and the magistrate's recommendations where the referral to the magistrate was without the consent of the parties.

4. Whether the Ninth Circuit erred in refusing to apply a standard of *de novo* review to the district court's decision where the district court labored under the erroneous legal conclusion that salary differences between petitioners and their comparators in other departments were to be judged solely by an unequal pay for equal work standard.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The following persons were parties to the proceeding below:

Plaintiffs/Appellants

Myrna J. Aavedal
Jeanne Q. Benoliel
Rose H. Bolin
Carol Blainey
Mary K. Boozer
Edna M. Brandt
Frances E. Briscoe
Pauline M. Bruno
Margaret A. Bruya
Mary T. Bush
Evelyn I. Coombe
Diana M. Cowan
Ruth F. Craven
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Wanda Louise Shores
Margaret R. Spaulding
Anita Spietz
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Barbara Peterson Sullivan
Linda L. Waggoner
Alma M. Ware
Reg A. Williams
Vivian Wolf-Wilets

Intervenors/Appellants

James Bush
Elaine Childs-Gowell
Susanna Lee Cunningham
Charlene Foster
Carol Jean Halpenny
Sharon Noriko Hirako
Kathryn A. Lee
Diana Marie Norkool
Joanne M. Rokosky
Jacqueline Holt Vandeman
Susan A. Woods

Defendant/Appellee

University of Washington

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OPINIONS BELOW

The panel and specially concurring opinions below are in slip opinion and are reprinted as Appendix A. The Order Adopting Recommendations of Special Master and Dismissing Action Under Rule 41(b) is not officially published but is unofficially published at 35 FEP Cases 168 (W.D. Wash. 1981), and is reprinted as Appendix B. The Report of Special Master and Recommended Findings of Fact and Conclusions of Law are set forth in Appendix C and Appendix D, respectively. The oral ruling of the magistrate on defendant's Fed. R. Civ. P. 41(b) motion is reprinted in Appendix E.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed on July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the Ninth Circuit Court of Appeals was invoked under 28 U.S.C. § 1291. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331, § 1337, and § 1343.

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

This case concerns the proper interpretation of sections of the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and (h). It also involves the proper interpretation of Article III of the United States Constitution, the United States Magistrates Act, 28 U.S.C. § 636, 42 U.S.C. § 2000e-5(f)(5), and Fed. R. Civ. P. 53. These provisions are set forth in Appendix F to this petition.

STATEMENT OF THE CASE

The questions presented in this petition provide an opportunity for this Court to clarify the law and to

resolve intercircuit conflicts on important issues of employment discrimination law, including: (1) the proper interpretation and application of the disparate treatment and disparate impact theories in a sex-based wage discrimination case brought under Title VII, including the burdens of production and persuasion, and (2) the proper standard of review under the United States Magistrates Act. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that sex-based wage discrimination claims under Title VII were not limited to claims of unequal pay for equal work, but declined to specify the "precise contours" of Title VII sex-based wage discrimination cases. This case provides an opportunity for this Court to clarify the law applicable to such claims.

A. Proceedings Below

This lawsuit was commenced in 1974 as a class action on behalf of present and former members of the faculty of the School of Nursing at the University of Washington, alleging violations of the Civil Rights Acts of 1871 and 1964, 42 U.S.C. § 1983 and § 2000e-2(a). In August 1977, the district court, *sua sponte* and without consent of the parties, referred the case to a United States magistrate, finding that trial could not be had within 120 days. In May 1979, the complaint was amended to include a claim under the Equal Pay Act, 29 U.S.C. § 206(d), and to eliminate the class allegations. The parties stipulated to permit intervention by eleven persons who, after notice by the magistrate, had filed objections to the dismissal of the class claims. The claims of the intervenors were stayed pending final determination of the claims of the plaintiffs.

The case was tried to the magistrate in May and June 1979, prior to the Ninth Circuit Court of Appeals decision in *Gunther v. County of Washington*, 623 F.2d 1303 (9th

Cir. 1979). At the close of plaintiffs' case, the magistrate orally advised the parties he would grant the defendant's Fed. R. Civ. P. 41(b) motion, on the ground that Equal Pay Act standards governed all of plaintiffs' claims and that plaintiffs had not proven substantial equality. Subsequent to that ruling, but before the magistrate issued a written report, *Gunther v. County of Washington*, *supra*, was decided, rejecting the legal basis for the magistrate's ruling. In October 1980, the magistrate filed his written report and findings recommending dismissal.

Subsequently, plaintiffs sought to have the District Judge direct the magistrate to cause the filing of the transcript, without charge to plaintiffs, so that he could make the required *de novo* review of the proceedings. When the court refused, plaintiffs took an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Because the court refused to grant injunctive relief pending the appeal, plaintiffs were compelled to order and pay for the transcript. On April 13, 1982, the Ninth Circuit Court of Appeals held that the district court should have caused the preparation and filing of the transcript without charge to plaintiffs. *Spaulding v. University of Washington*, 676 F.2d 1232 (9th Cir. 1982).

Plaintiffs and intervenors filed their objections to the magistrate's report on April 1, 1981. On motion by the University the district court extended the time for the defendant's response to plaintiffs' objections until after this Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981). On December 17, 1981, the district court adopted the magistrate's recommendations and dismissed the case. Plaintiffs and intervenors appealed. On July 3, 1984 the Ninth Circuit issued its opinion affirming the dismissal.

B. Petitioners' Proof

At all relevant times, the School of Nursing faculty was overwhelmingly female, being at time of trial approximately 96% female. Thus, internal comparisons between male and female nursing faculty members was virtually impossible. Therefore, with the assistance of their expert witnesses, Dr. Richard Bailey and Dr. Edward Blakely, petitioners developed a methodology for selecting appropriate male comparators from other departments within the University. Dr. Richard M. Bailey was department chair and professor of health economics in the Department of Social and Administrative Health Services in the School of Public Health at the University of California at Berkeley. Dr. Edward Blakely was assistant vice president of academic personnel at the University of California at Berkeley, responsible for administering compensation, promotion and other personnel policies for faculty on all nine campuses of the University of California system.

Doctors Bailey and Blakely selected the departments of health services, environmental health, pharmacy practice, social work, urban planning, architecture, rehabilitative medicine, and speech and hearing as most comparable to the School of Nursing. The criteria by which these departments were selected were that they were professional schools with a terminal degree mix similar to the School of Nursing, their students were taught in both classroom and clinical settings, and they encompassed a health care component. Doctors Bailey and Blakely testified as to their knowledge of the comparator disciplines and what faculty members in those disciplines do. Various faculty members in the comparator departments, twenty of the petitioners, and the former dean of the School of Nursing at the University of Washington testified as to the work done by the nursing

faculty and faculty in the selected comparator departments. The petitioners also testified about the interdisciplinary programs in which faculty from the School of Nursing and the comparator departments taught courses together. In addition, Dr. Blakely described the step scale salary system at the University of California in which comparisons are made and salaries are set irrespective of discipline.

Having selected the comparator departments, Dr. Bailey established the criteria for selection of the individual comparators from those departments. The initial screening process was to use, wherever possible, white males whose terminal degree (*i.e.*, bachelor's, master's, or Ph.D.) was the same as the individual petitioner's, and whose date of terminal degree and date of initial employment were within five years of the date of degree and date of employment of the petitioner in question. These criteria resulted in a total of 216 separate comparisons, with an average of six comparisons for each petitioner.

The records used by petitioners to select the individual comparators and to calculate the salary disparities were what the defendant called "President's Cards." These were business records maintained in the office of the University president. They were produced by the University in response to discovery requests and admitted at trial as business records. There was a card on every faculty member at the University, showing degrees held and dates awarded, dates of employment by the University, ranks and dates of any changes in rank, and a complete salary history including increases and reasons for increases, such as "merit," "cost of living," "female inequity," and so forth.

The information from the President's Card for each petitioner and each comparator was then keyed into a

computer by petitioners' computer specialist. The comparators' salaries were then adjusted for experience and for merit and promotion increases. For example, a computer run showed that the average annual salary increase in the comparator departments, excluding merit and promotion increases, was 4.58%. This percentage figure was then used to adjust for experience, using the date of terminal degree as the baseline. Thus, if a comparator was awarded his degree one year before the petitioner in question, his salary was adjusted downward by 4.58%, to factor out salary disparities due to his additional year of experience. Similar adjustments were made for merit and promotion increases (the latter being shown on the President's Cards by a salary increase contemporaneous with a change in rank) earned by a particular petitioner or comparator and for fringe benefits.

Various computer runs were then made to produce a complete salary history for each petitioner and her comparators. The result was a showing of an average annual salary disparity of about $5,800 or about 35% of total salary, based on an average petitioner's salary of $12,000. Because the University's policy was generally to grant percentage salary increases, the annual disparity, which was about $5,100 in 1971, had widened to about $7,300 at time of trial. Under the step scale salary system in use at the University of California, which Dr. Blakely described, $3,500 represented five steps on the scale.

In addition to the testimony of Doctors Bailey and Blakeley and the computer-generated salary studies, petitioners presented evidence of the University's discriminatory animus and as to the notice received by the University of the discriminatorily low salaries it paid to its female faculty, and the unresponsiveness of the University's senior male administrators. As early as 1970

various groups and individuals had charged the University with discriminating against its female faculty and urged the University to develop means by which the salaries of faculty in female-dominated departments could be examined for the presence of sex discrimination. Dr. Philip Cartwright, the equal employment officer of the University during the relevant time, testified that when Title VII was extended to cover institutions of higher education in 1972, the University became conscious of the "possibility" that it might have been discriminating against female faculty. Upon examination of its records the University found that it had indeed been discriminating. Thus, in 1973 the University made what it termed on the President's Cards "female inequity increases" in all departments in which there were female faculty *except* those in which the faculty was predominantly female.

With respect to its female dominated departments, however, the University maintained and has maintained throughout this litigation, that it was impossible to compare the nursing faculty salaries to salaries paid to faculty in other disciplines to determine whether the nursing faculty was discriminatorily underpaid, and that it merely paid the "market rate" for each discipline. The University claimed to compare its nursing faculty salaries to those paid at the schools of nursing at seven "comparable" institutions. Since the University did not put on its case, there was no evidence as to the relevance or appropriateness of the University's claimed seven-institution market, whether the University in fact followed this policy, whether such a policy was justified as a business necessity or whether such a policy was reasonable in light of its stated purpose

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's rejection of the disparate impact theory conflicts with decisions in other circuits and with applicable decisions of this Court, and decides an important question of federal law which has not been, but should be, decided by this Court.

Petitioners' Title VII case was premised on both disparate impact and disparate treatment. With respect to their disparate impact case, the most crucial of the facially neutral policies identified by petitioners were the University's claimed policy of paying the "market rate" for various disciplines, its policy of granting percentage salary increases, and its policy of allocating monies to its schools and departments according to the subjective, undefined criteria of the all-male three-member University Budget Committee. The Ninth Circuit held that "where plaintiffs' sex-discrimination claim is a wide-ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact." The court held further that impact analysis applies to specific objective employer practices, such as fringe benefit policies or testing devices, and that the University's asserted wage policy was "not the sort of 'policy' at which disparate impact analysis is aimed."

In effect, this decision hands every employer in a Title VII wage discrimination case a fail-safe defense: the employer need only claim to pay "the market rate" and nothing more will be required because paying "the market rate" is not a policy in the Title VII sense. Never mind whether that policy is a mere pretext; never mind whether there is a less discriminatory alternative; never mind whether that policy is justified as a business necessity or whether that policy is applied reasonably in view of its stated purpose; never mind whether the

asserted market is itself discriminatory. The Ninth Circuit has effectively taken judicial notice of an affirmative defense and the business necessity of that defense. An employer need merely utter the magic words, "But I'm paying the market rate," and the doors of the courthouse slam shut to the vast numbers of women who labor in female-dominated occupations. That sweeping holding, amounting to the establishment of a *per se* defense, is such an unprecedented departure from the accepted and usual course of judicial proceedings that this Court ought to grant certiorari to correct this aberration.

Other courts have applied impact analysis in compensation cases, *see, e.g., EEOC v. Ball Corp.*, 661 F.2d 531 (6th Cir. 1981), and in cases where the employer claimed to pay "market" rates, *see, e.g., Craik v. Minnesota State University Board*, 731 F.2d 465 (8th Cir. 1984). The Ninth Circuit's decision conflicts with those decisions and is contrary to this Court's repeated admonition that "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form but discriminatory in operations.'" *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981), *citing, Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

A. An employer's asserted policy of paying "market rate" wages is a policy within the meaning of Title VII.

The disparate impact theory was first articulated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), wherein an employer's intelligence test was found to have violated Title VII because it had a disproportionate impact on minorities. Disparate impact claims involve

> employment practices that are facially neutral in their treatment of different groups but that in fact

> fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977), *on remand, EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690 (5th Cir. 1981).

The principle that Title VII prohibits "[d]iscriminatory consequences as well as discriminatory intent," *Wright v. Nat'l Archives and Records Service*, 609 F.2d 702, 713 (4th Cir. 1979) (*en banc*), was endorsed by Congress in enacting the 1972 amendments to Title VII, which, *inter alia*, extended Title VII's coverage to institutions of higher education.

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, *perpetuation of the present effects of earlier discriminatory practices through various institutional devices*, and testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance.

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2144 (emphasis added; footnote omitted).

A "policy" is simply a "definite course or method of action"; "a specific decision or set of decisions"; "a projected program." *Webster's Third New International Dictionary* (1963). Similarly, a "practice" is "repeated or

customary action." *Id.* What an employer decides to pay its employees is probably one of the most important of its policies. It is ludicrous to think that an employer can have a "policy" as to the fringe benefits it provides to employees, *e.g.*, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, ___ U.S. ___, 77 L. Ed. 2d 1236, 103 S. Ct. ___ (1983), but not as to wages. Perhaps the employer has taken a survey of what other employers are paying in order to determine that it will pay more, or less, or the same as one or more of those other employers. How can that employer's actions in determining its wages be anything other than a "policy" that is cognizable under Title VII disparate impact analysis? In this case, the University claims to compare its nursing faculty salaries to the salaries paid to the schools of nursing faculty at seven "comparable" institutions. How can that be anything other than a policy?

B. The Ninth Circuit's decision conflicts with decisions in other circuits that a "market rate" policy may be challenged for disparate impact.

The Ninth Circuit's rejection of the disparate impact theory in the context of an alleged "market rate" payment of wages is in direct conflict with the Eighth Circuit's decision in *Craik v. Minnesota State University Board*, 731 F.2d 465 (8th Cir. 1984). Female faculty members of St. Cloud State University alleged classwide and individual sex discrimination in employment with respect to appointment to chair and administrative positions, rank, compensation, and sexual harassment. With respect to their compensation claims, plaintiffs contended that female faculty received lower salaries overall and fewer "market-factor" and performance increases. In 1980 the defendant university began distrib-

uting "market factor" increases in five "traditionally all-male disciplines identified as 'scarce market areas': . . ." *Id.* at 480. Plaintiffs' claims based on the "market factor" increases were analyzed under a disparate impact theory; all other claims were addressed under disparate treatment. The court noted the discriminatory impact on women of the "market factor" awards, but held that the magistrate did not clearly err in finding that these awards were "necessary."

Other circuits have held that a non-market rate wage policy may be attacked for its adverse impact. In *Bryant v. International Schools Serv., Inc.*, 675 F.2d 562 (3d Cir. 1982), two women employed by the defendant to teach at the American School in Iran alleged that the defendant's policy of awarding two different employment contracts with unequal benefits to persons hired to work in Iran violated Title VII. Almost all of the people hired under the less lucrative "local hire" contracts, awarded to persons hired in Iran, were women. The "ISS-sponsored" contracts, which were awarded to persons hired in America and sent to Iran, were divided equally between men and women.[1] Although the majority opinion did not specifically designate the case as one involving discrimination in compensation, the concurring opinion noted that "[t]his is a compensation case. . . ." *Id.*, 675 F.2d at 577. The district court held that plaintiffs had made out a prima facie case of both disparate impact and disparate treatment. The court of appeals accepted the applicability of the disparate impact theory to the case, but held that plaintiffs failed to prove a disproportionate impact, because they offered no proof on the

[1] The ISS-sponsored contracts included additional allowances such as a monthly overseas allowance equal to 25% of base salary, transportation, shipping and housing allowances, and annual round trip air fare to the United States.

number of men and women who applied for the less lucrative local hire contracts.

The Sixth Circuit has likewise held that disparate impact analysis is applicable to a sex-based wage discrimination case. In *EEOC v. Ball Corp.*, 661 F.2d 531 (6th Cir. 1981), defendant's employees worked an eight-hour shift including a half hour for lunch. The female dominated "finisher" jobs were paid for 7½ hours; the predominantly male jobs were paid for 8 hours. Applying disparate impact analysis, the court held that the policy had a disparate impact but determined it was justified by business necessity.

The Ninth Circuit relied in part on *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982), for its conclusion that impact analysis is inapplicable in this case. In *Pouncy*, a black (male) former employee produced statistics showing that black employees were paid less than white employees, were promoted less, and were overrepresented in the lower levels and underrepresented in the upper levels of the defendant's work force. Plaintiff argued that three of defendant's practices were responsible for the disparities: (1) job vacancies were not posted or otherwise made known to employees; (2) defendant's "level system" through which clerical employees often were hired at entry level positions and subsequently promoted, retained black employees at the lowest level; and (3) subjective criteria were used in employee performance evaluations.

Although the parties and the district court had applied impact analysis, the Fifth Circuit held that it is "incorrect" to apply that model to challenge multiple employment practices simultaneously. The employee must identify the specific practice responsible for the disparity. "The disparate impact model applies only when an employer

has instituted a specific procedure, usually a selection procedure for employment, that can be shown to have a causal connection to a class based imbalance in the work force." *Id.* at 800. None of the three practices identified by Pouncy were "selection procedures to which the disparate impact model traditionally has applied." *Id.* at 801. Following the *Pouncy* analysis, the Ninth Circuit held that a "market rate" wage policy is not a selection procedure to which the disparate impact model applies, nor were the University's subjective discretionary budgeting criteria within the "traditional" selection procedures.

The *Pouncy* analysis was explicitly rejected in *Segar v. Smith*, No. 82-1541, slip op. (D.C. Cir. June 22, 1984), 35 FEP Cases 51, in which "plaintiffs challenge[d] both the entirety of DEA's employment system and several specific components of that system," *id.*, 35 FEP Cases at p. 34,089, including salaries. The District of Columbia Circuit held that if a plaintiff shows a "disparity between members of the plaintiff class and comparably qualified members of the majority group," *id.*, then the defendant, in order to rebut the plaintiff's showing, must either (1) refute the disparity itself or (2) show that the disparity was not the result of discrimination violative of Title VII, that is, show that there is a legitimate non-discriminatory explanation for the disparity. If a defendant chooses to defend by identifying a purportedly non-discriminatory reason for the disparity, then all the elements of a disparate impact case are present and the defendant must then prove the business necessity of the practice.

The court stated that requiring the employer to identify which of its employment practices or policies caused a disparity would not place on the employer any additional burden of proof. To avoid liability for disparate treatment the employer must identify a non-discriminatory

reason for an observed disparity; the employer is not required to justify all of its employment practices.

More importantly, "[t]he employer will possess knowledge far superior to that of the plaintiff as to how its employment practices affect employees." *Id.* at p. 34,093. The employer's superior knowledge justifies placing on the employer the burden of proving the business necessity of an employment practice. Requiring the employer to make the same identification of a non-discriminatory reason in a disparate impact case would better advance the purposes of Title VII to root out artificial, arbitrary and unnecessary hurdles in employment.

Pouncy, relied upon by the court of appeals below, is in direct conflict with *Segar*. *Pouncy* refuses to allow an employee to challenge multiple employment practices via the disparate impact theory, and requires the employee to prove that (1) a specific (2) objective policy or practice (3) caused the disparity. *Segar* holds that impact analysis is appropriate if the employer defends a disparity by identifying a particular policy, act or practice as the cause. Then all the elements of a disparate impact case are present and the employer bears the burden of proving that the identified factor (1) caused the disparity and (2) is justified as a business necessity. The *Segar* situation is precisely what occurred in this case. The University has, from the outset, identified the cause of the salary disparities between the nursing faculty and the comparator faculty as its policy of paying "market rate" wages. It should therefore be required to prove the business necessity of that policy and that that policy is reasonably related to its stated purpose.

Because the disparate impact at issue here is sex-based, the alleged "market" defense must meet the requirements of the affirmative defenses of the Equal

Pay Act, which have been incorporated into Title VII. 42 U.S.C. § 2000e-2(h). The Ninth Circuit misconceived the nature of this defense by requiring a plaintiff to disprove "market" as part of the prima facie case. If "market" can be a "factor other than sex" under Title VII, even though it is not a "factor other than sex" under the Equal Pay Act, *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), then the employer must prove it as an affirmative defense. The statute places that burden upon the employer. Moreover, the employer is the party in possession of superior knowledge with respect to what is its "market" policy and how that policy affects its employees, which justifies placing that burden on the employer.

Denying women plaintiffs the opportunity to show that their wages are lower than male employees' as the result of an unjustified facially neutral policy of the employer is contrary to the broad remedial purpose of Title VII. *County of Washington v. Gunther*, *supra*, 452 U.S. at 178. In enacting Title VII, Congress intended to eliminate all incidents of discrimination based on race, sex, religion or national origin.

"Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2141. Under Title VII, discrimination on the basis of sex is as unlawful as discrimination on the basis of race; discrimination in compensation is as unlawful as discrimination in hiring. Disparate impact analysis is as well established and important a tool in combatting discrimination as is disparate treatment. Denying women the use of disparate impact to challenge their wages creates a distinction between racial discrimination and

sex discrimination that would undermine the purposes of Title VII. This Court should grant certiorari to correct the errors by the court below and to resolve the conflicts in the circuits concerning the applicability of the disparate impact theory and the nature of a "market" defense under Title VII.

II. In rejecting petitioners' "comparability plus" test, the Ninth Circuit improperly limited *Gunther* to the examples of blatant intentional discrimination set forth therein.

In *County of Washington v. Gunther*, *supra*, this Court held that a Title VII plaintiff alleging sex-based wage discrimination need not meet the "substantial equality" requirement of the Equal Pay Act. Plaintiffs in that case had alleged that the difference between their wages and the wages of certain male employees was due at least in part to intentional sex discrimination.[2] The district court refused to hear any evidence of intentional discrmination, holding that the Bennett Amendment to Title VII precluded such a claim under Title VII. This Court ultimately rejected the district court's interpretation of the Bennett Amendment, but declined to specify the requirements of a wage discrimination case under Title VII. This case provides the much-needed opportunity for this Court to "flesh out" its ruling in *Gunther* with respect to the requirements of a disparate treatment claim of intentional discrimination when the jobs compared are not substantially equal.

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[2] The County had evaluated its jobs and determined that the female prison guards should have been paid 95% as much as the male guards. However, the County then paid the female guards only 70% as much.

Petitioners urged the district court to adopt a sliding scale test in which the nature of the evidence of intentional discrimination would vary in inverse proportion to the comparability of the jobs shown, in other words, that the closer a plaintiff comes to meeting an equal work standard, the less evidence of intent or evidence from which intent may be inferred, should be required.[3] This suggestion was not even addressed by the district court in its decision adopting the magistrate's report.[4] *See* Appendix B. The district court's order shows that it conceived of petitioners' case as based solely on Equal Pay Act standards.

If a Title VII plaintiff shows unequal pay for equal work, then a prima facie case has been established. No other proof of intentional discrimination is required. At the other end of the scale, "if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male," *County of Washington v. Gunther*, 452 U.S. at 178-179, Title VII provides redress. It is the cases which fall between these extremes that this Court declined to address in *Gunther*.

Petitioners' proposed sliding scale "comparability plus" test is perfectly designed to permit courts to determine whether plaintiff has produced sufficient evidence to

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[3] In her concurring opinion, Judge Schroeder of the Ninth Circuit erroneously stated that petitioners had not presented that theory to the district court. *See* Appendix A. Petitioners did make that argument at pages 33-37 of their Memorandum in Support of Objections to Magistrate's Report.

[4] The district court's order adopting the magistrate's recommendations cited only one case, and that was on the question of the standard of review.

permit an inference of intentional discrimination. If jobs are substantially equal, then proof of intent is not required. Logically then, the more similar the jobs being compared, the greater is the likelihood that the sex of the job-holders is the reason for any pay disparity and the less evidence of intent a court should require. Conversely, the more dissimilar the jobs, the less likely it is that sex is the reason for a pay disparity. In such a case there should be a stronger showing of evidence from which an inference of intent may be made.

In *Gunther*, this Court held that an employer's failure to pay its female employees the full evaluated worth of their jobs when it so paid male employees stated a cause of action under Title VII. This Court went on to suggest other examples that would be actionable under Title VII: where an employer who admits a female employee would be paid more if she were a male or an employer that uses a wage determination system that incorporates sex bias. In rejecting petitioners' evidence of discriminatory animus, the Ninth Circuit has, in effect, held that if the jobs being compared are not substantially equal, then a plaintiff must produce the most blatant evidence of intentional discrimination. This Court should grant certiorari to correct the Ninth Circuit's improperly narrow reading of *Gunther*.

III. The refusal of the courts below to require a *de novo* review of the magistrate's findings denied petitioners their constitutional right to a determination by an Article III judge and misconstrued the United States Magistrates Act.

In this case the Ninth Circuit held that when a Title VII case is referred to a magistrate as a special master pursuant to 42 U.S.C. § 2000e-5(f)(5) and 28 U.S.C. § 636(b)(2), because the trial cannot be had within 120

days, the clearly erroneous standard of Fed. R. Civ. P. 53(e)(2) applies to the district court's review of the magistrate's findings and recommendations. The court ruled that 42 U.S.C. § 2000e-5(f)(5), permitting the district courts to appoint a master in Title VII cases, incorporated all of Fed. R. Civ. P. 53 except part (b), which limits the types of cases in which special masters may be appointed. The result of the Ninth Circuit's ruling is that Title VII cases are now singled out for reduced constitutional protections. Under this decision, a district court may, without the consent of the parties, refer any Title VII case to a United States Magistrate "as special master" and the parties will thereby be deprived of their constitutional right to have their case reviewed and decided by an Article III judge.

The implications of this ruling are far-reaching. The congestion in the district courts is only too well known. Few, if any, Title VII cases can be tried within 120 days after issue has been joined. This decision in effect holds that district courts may relieve their docket congestion at the expense of Title VII litigants' constitutional right to an Article III judge. Under this decision, virtually *every* Title VII case can be referred to a magistrate-as-special-master, simply because trial cannot be had within 120 days, and the magistrate's findings will be reviewed only for clear error. That result is a distortion of the Congressional solicitude for the rights of Title VII litigants as expressed in 42 U.S.C. § 2000e-5(f)(5). That result cannot have been the intent of Congress in requiring Title VII cases to be expedited, 42 U.S.C. § 2000e-5(f)(5), or in permitting United States Magistrates to sit as special masters, 28 U.S.C. § 636(b)(2). That result does not meet the requirements of Article III.

The "inexorable command" of Article III, Section 1, of the Constitution "is clear and definite: the judicial power

of the United States must be exercised by courts having the attributes prescribed in Art. III." *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982). Article III establishes the "principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges, ..." *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F.2d 537 (9th Cir. 1984) (*en banc*), *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 16, 1984) (No. 83-1873). To satisfy the requirements of Article III and the purpose and structure of the United States Magistrates Act, the order of reference in this case can only be upheld as a reference under 28 U.S.C. § 636(b)(3), pursuant to which petitioners were entitled to *de novo* review.

A. The reference cannot stand on the basis of Fed. R. Civ. P. 53 and 42 U.S.C. § 2000e-5(f)(5).

The district court *sua sponte* referred this case "pursuant to Rule 53, Fed. R. Civ. P., and 42 U.S.C. § 2000e-5(f)(5), and local Magistrate's Rule MR 21 ... to United States Magistrate Philip K. Sweigert as Special Master." The reason for the referral, as stated in the order of reference, was that trial could not be had within 120 days after issue had been joined.

Fed. R. Civ. P. 53(b) provides for the appointment of special masters to hear proceedings in certain instances.[5] However, the kinds of cases in which referrals may be had are limited.

The rule does not permit the wholesale referral of cases; some exceptional circumstance must be present and considered as the basis for the reference. *See LaBuy*

[5] The last sentence of Rule 53(b) was added by amendment in 1983.

v. Howes Leather Co., 352 U.S. 249 (1957); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

In 1972, Congress made several amendments to Title VII. One of these was 42 U.S.C. § 2000e-5(f)(5):

> It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

The legislative history of this amendment does not reveal its intended purpose and effect. *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137. It is doubtful, however, that Congress intended this section to permit the wholesale referral of Title VII cases to masters absent some "exceptional circumstance." If that had been Congress' purpose, the second sentence of this section would read "without regard to Rule 53(b)" instead of "pursuant to rule 53." Most likely, "[t]hat portion was merely included so that the test of Rule 53, which permits masters to be appointed only in exceptional circumstances, would be somewhat relaxed in the area of Title VII, 'where justice delayed is very often justice denied.'" *Hackley v. Roudebush*, 520 F.2d 108, 153 n. 181 (D.C. Cir. 1975), *quoting* Legislative History of the Equal Employment Opportunity Act of 1972, 92nd Cong., 2d Sess. (Comm. Print 1972) at 1731 (remarks of Senator Javits). There is no evidence that Congress intended such a "relaxation" of Rule 53 so as to nullify the limitations of Rule 53(b). The provisions of Rule 53(b) should not be deemed abrogated absent clear Congressional intent to do so.

Thus, the fact that trial of petitioners' Title VII claims could not be had within 120 days could not have been an "exceptional circumstance" encompassed by Rule 53(b). The reference must stand or fall upon some provision other than Fed. R. Civ. P. 53 and 42 U.S.C. § 2000e-5(f)(5).

B. The reference cannot be maintained under the provisions of 28 U.S.C. § 636(b)(2).

In 1976, Congress substantially amended the United States Magistrates Act, 28 U.S.C. § 631 *et seq.*, to "clarify and further define the additional duties which may be assigned to a United States Magistrate. . . ." H.R. Rep. 1609, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 6162. One of these amendments was 28 U.S.C. § 636(b)(2), which provides:

> A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

The legislative history of this amendment shows that it was enacted expressly to authorize a magistrate to be appointed as a special master, but was not intended to defeat the requirements of Rule 53(b) absent the express initial consent of the parties. *See* H.R. Rep. 1609, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 6162, 6172 ("[N]o significant purpose is served by restricting the use of magistrates where the parties agree to this procedure."). As this Court has cautioned, § 636(b)(2) "is clear that not every reference, for whatever purpose, is to be characterized as a reference to a

special master." *Mathews v. Weber*, 423 U.S. 261, 273 (1976).

Local Magistrate's Rule 21[6] purported to base the authority for Title VII references to a magistrate sitting as a special master pursuant to 28 U.S.C. § 636(b)(2). However, unlike § 636(b)(2), MR 21(b) contained no provision requiring the consent of the parties. MR 21(b) was in derogation of the clear Congressional intent expressed in § 636(b)(2), which requires express initial consent for such a reference. Thus, MR 21(b) could not support the reference.

C. The reference can only be upheld as a reference under 28 U.S.C. § 636(b)(3), under which petitioners were entitled to *de novo* review.

Under § 636(b)(1)(A), a magistrate is given the power to "hear and determine" non-dispositive pretrial matters and any such matter may be reconsidered by the district court if the magistrate's order was "clearly erroneous or contrary to law." Under § 636(b)(1)(B) the magistrate may "conduct hearings" on the dispositive motions enumerated as exceptions in § 636(b)(1)(A), and submit

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[6] Rule 21 of the Western District of Washington Magistrates' Rules provided that:

> In accordance with 28 U.S.C. § 636(b)(2), the full-time magistrates in this district, upon reference by a district judge, may, without additional compensation:
>
> . . . .
>
> (b) Serve as special master to try the issues in employment discrimination cases under Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. § 2000(e)(5)(F)(5)], without regard to the provisions of Rule 53(b), whenever the district judge determines that the case could not be scheduled for trial within one hundred twenty (120) days after issue is joined. . . .

The rule is now Magistrates' Rule 5.

proposed findings and a recommended disposition to the district court. Any party may object to the magistrate's proposed findings and recommendations and the district court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(B). Neither § 636(b)(1)(A) or (B) can support the reference in this case.

Section 636(b)(3) provides:

> A magistrate may be assigned duties as are not inconsistent with the Constitution and laws of the United States.

Courts have held that a *de novo* standard of review applies to references under § 636(b)(3) just as it does to references of dispositive matters under § 636(b)(1)(B). *Coolidge v. The Schooner California*, 637 F.2d 1321 (9th Cir.), *cert. denied*, 451 U.S. 1020 (1981); *Calderon v. WACO Lighthouse for the Blind*, 630 F.2d 352 (5th Cir. 1980). At best, this case was referable to the magistrate under the provisions of 28 U.S.C. § 636(b)(3). Petitioners were entitled to a *de novo* review by the district court.

The entire scheme of the United States Magistrates Act embodies a rule that (1) non-dispositive pretrial matters are subject to a "clearly erroneous" standard of review and (2) dispositive matters are subject to *de novo* review (3) unless the parties expressly, voluntarily and knowingly consent otherwise under the specified procedures of 28 U.S.C. § 636(c).[7] *See Ford v. Estelle*, No. 83-2151, slip. op. (5th Cir. filed Sept. 4, 1984). This rule satisfies the strictures of Article III. *See Coolidge*

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[7] At the time of reference in this case, subsection (c) had not been enacted. Its enactment is implicit authority that *de novo* review is required unless the parties consent to another standard.

v. The Schooner California, 637 F.2d 1321 (9th Cir.), *cert. denied*, 451 U.S. 1020 (1981).

Consistency, consideration of the scheme of the Magistrates Act and the strictures of Article III mandate application of the same distinction between review of dispositive and non-dispositive matters where a referral is characterized as being made under § 636(b)(2). To hold otherwise would permit the standard of review to depend on the mere words chosen in the order of reference and not on the basis of what actually occurred, *i.e.*, a civil trial on the merits to a United States magistrate. If there are any inconsistencies between Rule 53, 42 U.S.C. § 2000e-5(f)(5) and 28 U.S.C. § 636, Congress' latest pronouncement, embodied in § 636(c) which provides for trial and judgment by a magistrate only upon written consent of the parties, should control.

IV. The Ninth Circuit erred in not undertaking *de novo* review of the record.

The district court's failure to undertake a *de novo* review was compounded by the Ninth Circuit's failure to undertake a *de novo* review. It is clear that "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). *See also Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n. 15 (1982); *United States v. Swizer Manufacturing Co.*, 374 U.S. 174, 194 n. 9 (1963). The Ninth Circuit held it would not undertake a *de novo* review of the magistrate's findings, citing Fed. R. Civ. P. 52(a) and *Pullman-Standard v. Swint*, *supra*. The Ninth Circuit should have undertaken *de novo* review because the district court's and Magistrate's decisions rested on an erroneous view of the law.

When the magistrate orally announced he would recommend dismissal of petitioners' case, he did so on the theory that Equal Pay Act standards governed petitioners' Title VII claims. *See* Appendix E. Even after that theory was rejected by the Ninth Circuit's decision in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1980), *aff'd, County of Washington v. Gunther*, 452 U.S. 161 (1981), the magistrate adhered to his recommendation. In adopting the magistrate's findings, the district court repeated the magistrate's initial legal error that the entire case was governed by Equal Pay Act standards. The district court's order of dismissal is studded with references to "substantial equality":

> They allege that because of their sex, faculty women in the School of Nursing have received substantially *less pay* than male faculty elsewhere in the University for *substantially equal work.*

See Appendix B, Order Adopting Recommendations, at p. 1 (emphasis added).

> [T]he work done by plaintiffs is, broadly speaking, *comparable but not substantially equal* to the work done by male faculty in other schools and colleges.

Id., at p. 10 (emphasis added). And, critically:

> Entry level differences between relevant disciplines, as to rank and salary, indeed *salary differences* of veteran faculty between relevant disciplines *are material to this lawsuit only if those salaries constitute unequal pay for equal work.*.

Id., at p. 17 (emphasis added).

> The theory underlying their claim has been and remains clear and unmistakable. *Unequal pay for equal work.*

Id., at p. 17 (emphasis added).

> The study either ignores *the central fact disputed in this lawsuit, which is whether or not the work done by plaintiffs is substantially equal* to the work done by male faculty with whom they compare themselves, or it presumes equality.

Id., at p. 18 (emphasis added; footnote omitted).

It could not be plainer that the district court, like the magistrate, conceived of petitioners' claims as limited to one theory to which it purported to apply the Equal Pay Act standard. Despite this unmistakable error of law, the Ninth Circuit refused to undertake a *de novo* review, but held it was limited to the "clearly erroneous" standard in regard to the facts found. That refusal ignores this Court's rulings, cited *supra*, and well established case law in other circuits, *see, e.g., Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977), that findings of fact resting on an erroneous view of the law are not circumscribed by the clearly erroneous standard.

CONCLUSION

Beyond its impact on the petitioners, the Ninth Circuit's decision will have dire consequences for women who seek to prove sex-based wage discrimination, and is in conflict with decisions in other circuits, this Court's own statements on Title VII, and the purpose and intent of Title VII and the United States Magistrates Act. This Court should take this opportunity to resolve those conflicts and to establish rules for the proper course of Title VII litigation.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3038 D.C. No. CV 74-91

MARGARET SPAULDING, *et al.*, *Plaintiffs-Appellants*,

and

JAMES BUSH, *et al.*, *Intervenors-Appellants*,

vs.

UNIVERSITY OF WASHINGTON, *Defendant-Appellee*.

OPINION

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APPEAL from the United States District Court for the Western District of Washington, Walter T. McGovern, District Judge, presiding, Argued and Submitted February 9, 1983.

BEFORE: WALLACE, ANDERSON, AND SCHROEDER, Circuit Judges.

WALLACE, Circuit Judge:

Appellants are past and present members of the faculty of the University of Washington School of Nursing (the nursing faculty). One of them, Ruth Fine, has served as an associate administrator of the University's hospital, as the director of nursing services, and as an associate professor.

The intervenors, also past and present members of the nursing faculty, join in this appeal.

The nursing faculty filed suit in the district court alleging that the University engaged in discriminatory compensation practices in violation of 28 U.S.C. § 1983, the Equal Pay Act, and Title VII. The district court *sua sponte* referred the case to a United States Magistrate sitting as a special master. After the nursing faculty presented its case, the special master issued a report recommending dismissal of the action pursuant to rule 41(b) of the Federal Rules of Civil Procedure. The district court granted the motion for an involuntary dismissal. We have jurisdiction under 28 U.S.C. § 1291.

The nursing faculty argues that the district court erred in not reviewing the special master's findings de novo, that we must consequently engage in de novo review, and that the district court erred in dismissing the action under rule 41(b). On its substantive claims, the nursing faculty contends that it demonstrated that the University violated section 1983 and the Equal Pay Act, that it made out a prima facie showing of discrimination prohibited by Title VII under both the disparate treatment and disparate impact models, that the University cannot rely on a "competitive marketplace" defense, and that the nursing faculty is entitled to recover attorneys' fees. We affirm.

I

For purposes of this appeal, we accept the facts agreed to by the parties, the evidence admitted during presentation of the nursing faculty's case, and the district court's factual findings. Because the case was dismissed under Federal Rule of Civil Procedure 41(b) after the nursing faculty presented its case, the University did not present its case.

Washington State created the University of Washington by statute. Wash. Rev. Code Ann. §§ 28B.20.010-.20.820 (1982 & Supp. 1983). The University consists of 16 separate

schools, each under its own dean. Most schools are divided further into academic departments. The University functions under a very decentralized administrative scheme. Each school is responsible, subject to approval by the University's president, for faculty appointments, entry level of new appointees and their salary, promotions, and salary increases for individual faculty members. Generally, the University's president accepts departmental recommendations on these issues. The University's budget office allocates money to each school after receiving a salary allocation for the University from the state legislature. The budget office normally designates a portion of the funds for across-the-board salary increases. The remainder is then divided among the schools, sometimes in varying percentages, for distribution at the schools' discretion to their faculty.

In March 1972, members of the faculty of the School of Nursing filed a petition with Dr. Katz, Vice President for Academic Affairs and Provost of the University, alleging sex discrimination by the University. The University responded to the petition and provided certain salary data. Dr Grayson, Vice President of the Health Sciences Center, and Dr. Katz met with representatives of the nursing faculty to discuss the petition. The University asserted that salary levels varied because each academic discipline commanded a salary based upon training, expertise, emphasis, subject matter, and the academic marketplace for that discipline. Thus, the Universtiy argued that it was inappropriate to compare the average salary in one discipline with the composite average salary paid University faculty members. Subsequently, the University undertook, and made available to the nursing faculty, a more sophisticated study of salaries in the School of Nursing. The study concluded that faculty salaries as a whole at the University of Washington lagged 9 percent behind the salaries paid by schools with which the University had traditionally compared its salaries. The study also concluded that average faculty salaries in the School of Nursing lagged 10.9

percent behind salaries paid by comparable schools of nursing, but that many other disciplines also lagged at least that much behind.

In September 1972, the University's budget office allocated a 3 percent merit increase to each school. In response to the salary study findings, the budget office allocated an additional 2 percent increase to the School of Nursing in order to align the nursing faculty salaries with the average deficit in salaries at the University. Between 1973 and 1978, the University's budget office gave an above average allocation to the School of Nursing in two budget years and an allocation equal to that given other schools in three budget years.

The nursing faculty remained dissatisfied. Throughout the summer and fall of 1972, members of the nursing faculty held meetings to discuss their petition and related issues. In November 1972, a group entitled the Women's Salary Inequity Committee (the Committee) sought support from faculty members and sent a complaint letter to the Office for Civil Rights of the United States Department of Health Education, and Welfare. The Committee also filed a complaint with the Washington State Human Rights Commission. Thereafter, the Committee filed charges with the Equal Employment Opportunity Commission (EEOC) and the University's Human Rights Commission.

In February 1974, the United States Department of Justice issued a right to sue letter to Spaulding as head of the Committee and the nursing faculty filed this action. Although this suit was originally filed as a class action against officials at the University of Washington, the University was later substituted as the sole defendant and the class claims were dropped. The intervenors, after objecting to the dismissal of the class claims, were granted permission to intervene and their claims were stayed pending resolution of the named plaintiffs' claims.

In August 1977, after finding that he could not schedule the case for trial within 120 days after issue was joined, the

district judge *sua sponte* referred the case to a United States Magistrate pursuant to 42 U.S.C. § 2000e-5(f)(5), rule 53 of the Federal Rules of Civil Procedure, and Local Magistrates' Rule 21. The order of reference expressly stated that the magistrate was to sit as a special master, hear the case on the merits, and report recommended findings of fact, conclusions of law, and disposition. The order also stated that the special master's report would be subject to review by the district court in accordance with rule 53(e) of the Federal Rules of Civil Procedure.

After the nursing faculty presented its case before the special master, the special master stated that he planned to grant the University's rule 41(b) motion for involuntary dismissal. He concluded that the nursing faculty had failed to show that they performed substantially equal work compared to male faculty members in other departments and that the Equal Pay Act standard governed claims under Title VII and section 1983.

While the special master was preparing his findings and conclusions, we decided *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981) (*Gunther*). We held that a plaintiff who fails to show that he performs substantially equal work is not precluded from suing under Title VII for relief from intentionally discriminatory compensation practices unless such practices are authorized under one of the four Equal Pay Act affirmative defenses. 623 F.2d at 1310-13. The special master requested memoranda from the parties on the effect of our decision in *Gunther* on his 41(b) ruling. He then concluded that *Gunther* did not alter the outcome of the case and recommended that the district court dismiss the case.

The nursing faculty requested that the district court direct the special master to file a transcript of the proceedings before him with the district court. The district court denied this request, but certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). We granted permission

to appeal and held that the district court was required to provide a transcript. *Spaulding v. University of Washington*, 676 F.2d 1232, 1235 (9th Cir. 1982) (*Spaulding I*). We expressly declined to decide whether the district court was required to review the special master's findings under a de novo standard or a clearly erroneous standard. 676 F.2d at 1234 n.1.

Prior to our decision in *Spaulding I*, the transcript was prepared and used by the district judge as he reviewed the special master's factual findings under the clearly erroneous standard[1] and adopted both the findings of fact and conclusions of law with minor modifications. The District Judge then ordered dismissal under rule 41(b).

II

The district judge did not decide whether he had jurisdiction over the nursing faculty's claims, but went directly to the merits. This was incorrect.

Federal courts are courts of limited jurisdiction and may not resolve the merits of disputes if they lack jurisdiction. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practices & Procedure* § 3522 (1975). Although the district court failed to address the issue of its jurisdiction, we may affirm its decision on any basis supported by the record. *E.g.*, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (per curiam).

We first consider the district court's jurisdiction over the section 1983 claim. The eleventh amendment to the Constitution bars suit in federal court by citizens against a state or its agency under section 1983 unless the state has waived its immunity. *Quern v. Jordan*, 440 U.S. 332, 338-45 (1979); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam);

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[1] The parties agree that the district judge applied the clearly erroneous standard in his review. The record is unclear. In *Spaulding I*, we observed that the nursing faculty "obtained a de novo review by the district court." 676 F.2d at 1234. For purposes of this appeal, we will accept the issue as framed by the parties.

Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir.), *cert. denied*, 394 U.S. 966 (1969); *see* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 200-34 (1981).

The nursing faculty conceded in its amended complaint and in the pretrial order that the University is an agency of the State of Washington. Thus, we need not determine independently whether the University is a state agency. The nursing faculty does not assert that Washington waived its immunity. We therefore hold that the district court lacked jurisdiction over the nursing faculty's section 1983 claim.

The district court did, however, have federal question jurisdiction over the Equal Pay Act claims. The University comes within the Act because it is both an employer and an establishment within the meaning of the statute. 29 U.S.C. §§ 203(d), 206(d)(1).[2]

III

The nursing faculty asserts that the district court erred in not reviewing the special master's factual findings de novo. It bases this assertion on its interpretation of the applicable statutes, as well as on article III of the Constitution. Further, it argues that we must engage in de novo review of the facts because the district judge failed to do so. The nursing faculty also contends that the reference to the

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The parties did not raise before the district court nor on appeal whether *National League of Cities v. Usery*, 426 U.S. 833 (1976), and its progeny prevents the equal pay provision of section 206(d)(1) from being enforced against a state or state agency. *See, e.g., Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979); *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978); *see also Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1282 n.3 (9th Cir. 1979) (declining to decide issue), *cert. denied*, 445 U.S. 951 (1980). Because the parties neither raise the issue nor contend that it affects our jurisdiction, we do not reach the question.

special master was improper because 42 U.S.C. § 2000e-5(f)(5) does not authorize referrals of Equal Pay Act claims.[3]

We first consider whether the nursing faculty waived any of these objections. In *Spaulding I*, we held that the nursing faculty had not waived its right to have the district judge review a transcript of the proceedings before the special master. 676 F.2d at 1235. The nursing faculty raised its objection to the use of the clearly erroneous standard of review at the same time that it raised its objection to the transcript provision. Thus, we must hold that the nursing faculty did not waive its right to contest the use of the clearly erroneous standard of review.

Spaulding I, however, does not affect our determination of whether the nursing faculty waived its objection to referral of the Equal Pay Act claims. The nursing faculty waited until this appeal to raise the argument that Equal Pay Act claims cannot be referred to a special master under 42 U.S.C. § 2000e-5(f)(5). They are too late. Parties should object to a reference to a magistrate or a special master at the time the reference is made or within a reasonable time thereafter. *See, e.g., Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981) (per curiam); *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2de 1199, 1206 (9th Cir. 1974); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 53.05[3] (2d ed. 1982); 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2606 (1971).

We therefore turn to the merits of the nursing faculty's claim that the district court erred in not reviewing the special master's factual findings de novo. The district judge referred *sua sponte* the nursing faculty's claims to the

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[3]The nursing faculty also contends that section 2000e-5(f)(5) does not autorize referrals of section 1983 claims. We need not address this contention because the district court lacked jurisdiction over the section 1983 claim. *See* part II.

special master under the authority of 42 U.S.C § 2000e-5(f)(5)[4] and pursuant to rule 53 of the Federal Rules of Civil Procedure and rule 21 of the local magistrates' rules.[5] The order of reference provided that the magistrate would sit as a special master and that the master's report would be subject to review by the district court in accord with rule 53(e) of the Federal Rules of Civil Procedure. Rule 53(e) states that in a non-jury action, the district court shall accept the master's findings of fact unless clearly erroneous. Fed. R. Civ. P. 53(e)(2). After the master filed his report, the nursing faculty objected to the use of the clearly erroneous standard of review. The district judge rejected the nursing faculty's claim that de novo review was required, relying upon *White v. General Services Administration*, 652 F.2d 913 (9th Cir. 1981) (*White*).

In *White*, we held that a reference to a special master pursuant to the same local magistrates' rule now before us

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[4]Section 2000e-5(f)(5) provides that:

> It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

[5]Rule 21 of the Western District of Washington Magistrates' Rules provided that:

> In accordance with 28 U.S.C. § 636(b)(2), the full-time magistrates in this district, upon reference by a district judge, may, without additional compensation:
>
> . . .
>
> (b) Serve as special master to try the issues in employment discrimination cases under Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. § 2000(e)(5)(F)(5)] [sic], without regard to the provisions of Rule 53(b), whenever the district judge determines that the case could not be scheduled for trial within one hundred and twenty (120) days after issue is joined . . .

The rule is now Magistrates' Rule 5.

was proper under 42 U.S.C. § 2000e-5(f)(5). We also stated that:

> Despite the statutory language providing for appointment of a master pursuant to Rule 53, it is clear that Congress intended to relax that Rule's stricture that reference shall be made "only upon a showing that some exceptional condition requires it." ... There would have been little reason for the statute had Congress merely wished to confine referrals to the extremely limited instances contemplated by Rule 53(b). We therefore view the citation to Rule 53 in § 2000e-5(f)(5) as manifesting congressional intent to incorporate all of the rule except the severe restrictions upon reference.

White, 652 F.2d at 915 (citations omitted). By incorporating all of rule 53 except for part (b), *White* teaches that 53(e)(2) is applicable. That subdivision states in part "the court shall accept the master's findings of fact unless clearly erroneous." Thus, we agree with other courts which have held expressly that the clearly erroneous standard applies to review of a magistrate's or special master's factual findings in a Title VII case. *Cockrham v. South Central Bell Telephone Co.*, 695 F.2d 143, 145 (5th Cir. 1983) (per curiam); *Hayes v. Foodmaker, Inc.*, 634 F.2d at 802-03 (reference under 28 U.S.C. § 636(b)(2)); *Livas v. Teledyne Movible Offshore, Inc.*, 607 F.2d 118, 119 (5th Cir. 1979) (per curiam); *Harden v. Dayton Human Rehabilitation Center*, 520 F. Supp. 769, 770-71 (S.D. Ohio 1981) (reference under 28 U.S.C. § 636(b)(2)); *see also Oliver v. Allison*, 488 F. Supp. 885, 888-89 (D.D.C. 1980) (mem.) (consensual reference to magistrate).

The nursing faculty contends that de novo review is required in order to alleviate an "irreconcilable tension" between cases referred under sections of the Federal Magistrates Act requiring de novo review and cases referred pursuant to rule 53, but they cite only cases in which reference was under 28 U.S.C. § 636(b)(1) or (b)(3). Subsection 636(b)(1) expressly states that a district judge is

required to make a de novo determination of those portions of a magistrate's report to which a party objects. We require the same in references under subsection 636(b)(3). *Coolidge v. The Schooner California*, 637 F.2d 1321, 1325-27 & 1326 n.5 (9th Cir.), *cert. denied*, 451 U.S. 1020 (1981) (consensual reference). But these cases differ from those referred under 28 U.S.C. § 636(b)(2). Further, the nursing faculty's argument that 28 U.S.C. § 636(c), permitting a magistrate to hear and enter judgment in a civil matter upon consent of the parties, is implicit authority that de novo review is required unless the parties consent, lacks merit.

We hold that we should not undertake our own de novo review of the special master's factual findings. *See* Fed. R. Civ. P. 52(a); *accord Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982); *cf. Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 319 (5th Cir. 1981); *Coen v. Zick*, 458 F.2d 326, 328 (9th Cir. 1972) (findings of referee in bankruptcy which have been affirmed by district court not to be set aside unless clearly erroneous).

IV

On the merits of the Equal Pay Act claim, the district court held that the nursing faculty had failed to establish that its members performed work substantially equal to that performed by male faculty members in other parts of the University. The nursing faculty attempted to establish this claim by comparing the job of nursing faculty members to that of male faculty members in other schools of the University such as health services, social work, architecture, urban planning, environmental health, speech and hearing, rehabilitative medicine, and pharmacy practice. The nursing faculty does not assert that male and female members of the nursing faculty are treated differently. Indeed, one plaintiff and one intervenor are male members of the nursing faculty. The district court also held that Fine failed to establish that she performed work substantially equal to

that performed by either of the two male associate hospital administrators she identified as comparators.

The Equal Pay Act prohibits an employe subject to its provisions from discriminating in the payment of wages between employees on the basis of sex. In order to make out a prima facie case of an Equal Pay Act violation, the nursing faculty bears the burden of establishing that its members did not receive equal pay for equal work. *Hein v. Oregon College of Education*, 718 F.2d 910, 913 (9th Cir. 1983) (*Hein*); *Gunther*, 623 F.2d at 1309;[6] *see Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). If a prima facie case is established, the University may attempt to show that the payment of different wages is based on either a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a factor other than sex. 29 U.S.C. § 206(d)(1)(i)-(iv); *Corning*, 417 U.S. at 196; *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 875 (9th Cir. 1982); *Gunther*, 623 F.2d at 1308-09.

The Act defines, at least in broad terms, what constitutes equal work by specifying that jobs are equal if their performance requires equal skill, effort, and responsibility and they are performed under similar working conditions. 29 U.S.C. § 206(d)(1). A plaintiff may show that the jobs are substantially equal, not necessarily that they are identical. *Gunther*, 623 F.2d at 1309. Actual job performance and content, rather than job descriptions, titles or classifications, is determinative. *Id.* Thus, each claim that jobs are substantially equal necessarily must be determined on a case-by-case basis. *Hein*, 718 F.2d at 913; *Gunther*, 623 F.2d at 1309; *Usery v. Columbia University*, 568 F.2d 953, 958 (2d Cir. 1977). We disagree, therefore, with the University's contention that jobs from different academic disciplines can never be substantially equal. The proper resolution of each

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[6] Our decision in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981), is also reported at 602 F.2d 882.

case necessarily depends upon the actual content of the jobs. *Gunther*, 623 F.2d at 1309. The district judge's determinations on the issue of substantial equality are findings of fact. *Hein*, 718 F.2d at 913; *Gunther*, 623 F.2d at 1309; *accord Horner v. Mary Institute*, 613 F.2d 706, 713 (8th Cir. 1980). We apply the clearly erroneous standard of review.

The nursing faculty argues that it need only demonstrate that the objective characteristics of the jobs are substantially equal. Then, according to the nursing faculty's argument, the burden shifts to the University to show whether any subjective differences between the jobs, such as the subject taught, are legitimate and actual bases for the disparity. The cases relied upon by the nursing faculty are not cases under the Equal Pay Act, but, rather, are cases arising under Title VII and involve the allocation of burdens in a disparate treatment claim. *See, e.g., Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S. Ct. 53 (1982) (*Lynn*).

In attempting to meet its burden, the nursing faculty contends that nursing faculty members perform substantially equal work to that performed by specified comparator faculty members because both jobs require preparation and teaching of courses, research and publication, committee work, advising of students, and community service. The nursing faculty selected the departments relied upon for comparators because they are professional schools "with a degree mix similar to the school of nursing with practice related activities, where students are frequently put into clinical settings under faculty supervision." The nursing faculty introduced statistics attempting to compare 66 individual faculty members from the selected comparator departments with members of the nursing faculty based on degrees held, experience, and merit. In addition, the nursing faculty points to evidence describing various faculty positions and showing that its members

taught courses in comparator departments, engaged in research on interdisciplinary issues, and worked on committees with comparator faculty members. Despite the facial similarity in the nature of the faculty positions relied upon by the nursing faculty, the special master concluded that the nursing faculty had not shown substantial equality. The district judge adopted that finding. We conclude that the district judge's finding on substantial equality is not clearly erroneous. *See generally Horner v. Mary Institute*, 613 F.2d at 714 (affirming finding that jobs of two physical education teachers were not substantially equal even though "superficially identical in that both involve teaching of physical education").

The evidence supports the finding of the special master and the district judge on substantial equality. It indicates that the different departments in the University which plaintiffs used for comparators placed varying degrees of emphasis on research, training, and community service, and that nursing historically had been considered a discipline distinct from those plaintiffs chose for comparison. Further, the statistical evidence submitted by the nursing faculty was deficient in several respects. It did not adequately account for prior job experience, rank, or multiple degrees, and, most important, it did not adequately evaluate the actual work performed by various faculty members. We agree with the district court's observation that the nursing faculty's statistical evidence "either ignores the central fact disputed in this lawsuit, which is whether or not the work done by plaintiffs is substantially equal to the work done by male faculty with whom they compare themselves, or it presumes equality." The statistical evidence may demonstrate a pay disparity, but a difference in pay between jobs which women primarily hold and jobs which men primarily hold does not state a prima facie Equal Pay Act case if the jobs are not substantially equal. *See Horner v. Mary Institute*, 613 F.2d at 715. The district court was not clearly erroneous in finding that the nursing faculty had not shown that the actual day-to-day responsi-

bilities, skill, and effort required of the male comparators were substantially equal to that of the nursing faculty.

In reaching this decision, the district court adopted the special master's findings concerning the differences in training and education in academic fields. The nursing faculty argues that a difference in training and educational background is irrelevant to whether jobs are substantially equal. In brief, the nursing faculty contends that "teaching is teaching." The contention, although superficially appealing, lacks merit. As we stated previously, the determinative factor is actual job content. The Equal Pay Act specifies that equal skill is a component of equal work. 29 U.S.C. § 206(d)(1). The administrative regulations interpreting the Equal Pay Act define skill as including "consideration of such factors as experience, training, education, and ability." 29 C.F.R. § 800.125 (1983). Possession of skills irrelevant to the job requirements, however, cannot be considered in making a determination regarding substantial equality of skill. *Id.; see Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976). Clearly, training in an academic field is necessary to a job as a university faculty member in that field. *See Melanson v. Rantoul*, 536 F. Supp. 271, 287 (D.R.I. 1982) (refusing to compare plaintiff's salary to average salary of male associate professors absent showing that each associate professor's position requires equal skill). Some members of the nursing faculty had engaged in interdisciplinary teaching, research, or community activities, but the district judge did not err in adopting the master's finding that these were not job required although some individuals brought their unique skills to the work. At best, those activities were only a part of their duties and, thus, do not convince us that the district judge was clearly erroneous on the substantial equality issue.

The evidence on Fine's Equal Pay Act claim also shows that she did not prove substantially equal work. Fine was employed by the University of Washington Hospital from 1958 to 1976. She was director of nursing services from

1962 to 1976. From 1962 to 1968, she served as a clinical assistant professor in the School of Nursing. From 1968 to 1973, she was a part-time nontenured assistant professor in the School of Nursing and beginning in 1973, she was a part-time tenured associate professor. From 1969 to 1976, she also had the title of associate administrator. Since 1976, her exclusive position has been as an associate professor. She holds a master's degree in nursing and has some post-graduate training in business administration. She argues that she performed substantially equal work to that performed by Lang and Stein, two male associate hospital administrators.

During Fine's tenure at the hospital, she was responsible for supervising nursing personnel and for the respiratory therapy, central supply, medical records, and in-patient admitting departments. She testified that she reported directly to the hospital administrator, that in her capacity as associate administrator she was responsible for department development, program changes, and planning, and that she was responsible for the nursing department budget. She also testified that she chaired a committee which planned a computer program system for University Hospital and Harborview Medical Center (Harborview), was in charge of disaster plans, and served on various other committees. Harborview was also associated with the University. In addition, she at times had administrative responsibility for the entire hospital at night, on weekends, and on an on-call basis.

Lang holds a master's degree in public health and served as an assistant hospital administrator at University Hospital and then as an associate hospital administrator at Harborview. He was responsible for numerous hospital departments, in charge of labor negotiation, program development, and had a major role in hospital planning and administration. The special master concluded that Lang was responsible for administering more departments than Fine and that those departments were more complex. In

the absence of the hospital administrator, Lang assumed complete responsibility.

Stein holds a master's degree in business administration and served as an associate hospital administrator from January 1974 to March 1978 at the University of Washington Hospital. He then served as acting hospital administrator for a time. As associate administrator, he was second in command. He had primary administrative responsibility for all major professional departments, represented the administration in labor negotiations, and coordinated hospital planning and budgeting.

The district judge was not clearly erroneous in finding that the jobs of Fine and Lang or Stein were not substantially equal.

V

The nursing faculty also claims sex-based wage discrimination by the University in violation of Title VII of the Civil Rights Act of 1964. Section 703(a) of Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or to "limit, segregate, or classify his employees or applicants" because of sex. 42 U.S.C. § 2000e-2(a).

The decision rendered at the end of the nursing faculty's case indicates a determination by the district judge that no prima facie case has been established. Evidence which is relevant to the issue of a prima facie case may also be relevant to an employer's defense of good faith. Thus, these are findings which could be applicable to either of those issues or to the issue of pretext. Essentially, however, the issue is one of whether a prima facie case was established.[7]

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[7] Because we rule on the adequacy of the prima facie case, we do not address whether the University may rely on the competitive marketplace as a defense to a successful prima facie case under Title VIII.

This was our approach in *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983) (*Moore*).

Our past cases have not been consistent on whether our review of the lower court's ultimate finding regarding establishment of a prima facie case is de novo or under a clearly erroneous standard. *See generally Moore*, 708 F.2d at 480; *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 539-46 (9th Cir. 1982). We need not decide which standard is correct because in this case, as in *Gay* and *Moore*, we reach the same conclusion under either one.

The nursing faculty asserts that it has established a prima facie Title VII case of sex-based wage discrimination under both the disparate treatment and the disparate impact models, although it cannot show substantial equality of jobs. The Supreme Court's opinion in *Gunther* held that a Title VII cause of action exists outside the scope of the Equal Pay Act. 452 U.S. 161 (1981). The Court affirmed our holding "that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory [than substantial equality] compatible with Title VII." *Gunther*, 623 F.2d at 1321. We added that "[i]t is unnecessary to determine now what theories might be feasible." *Id.* The Supreme Court also declined to decide "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII," *Gunther*, 452 U.S. at 181, and took pains to "emphasize at the outset the narrowness of the question" it faced, *id.* at 166. *Accord Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1131-34 (5th Cir. 1983) (*Gunther* a special situation where plaintiffs presented clear, direct evidence of intentional discrimination).

A.

First, we examine the nursing faculty's claim under the disparate treatment model of sex discrimination. Plaintiffs proceeding under this theory must prove by the preponderance of the evidence a prima facie case of discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (*Burdine*); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (*McDonnell Douglas*). To do so, the nursing faculty must show "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible [i.e. sex-based] considerations." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 580 (1978); *White v. City of San Diego*, 605 F.2d 455, 458 (9th Cir. 1979). While the burden of establishing a prima facie case "is not onerous," *Burdine*, 450 U.S. at 253, disparate treatment cases necessarily require direct or circumstantial proof of discriminatory motive, whereas no such proof of motive is required in disparate impact cases. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (*Teamsters*); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1014 (11th Cir. 1982); *Heagney v. University of Washington*, 624 F.2d 1157, 1163 (9th Cir. 1981) (*Heagney*).

Of course, Title VII's nature and purpose require that the *McDonnell Douglas* test be flexible. What must be shown to support an inference that the plaintiff was discriminated against depends on the facts of each case. *Peters v. Lieuallen*, 693 F.2d 966, 969 (9th Cir. 1982); *Hagans v. Andrus*, 651 F.2d 622, 626 (9th Cir. 1981). Thus, we do not specify the minimum factors required for plaintiffs to establish a prima facie Title VII case of sex-based wage discrimination.

Because the district court did not clearly err on the issue of substantial equality, the nursing faculty's case must rest solely on evidence creating an inference that the wage disparity they point to was more likely than not the result of intentional sex discrimination. Under *Gunther*, it is certain that if the nursing faculty were to base its prima facie case only on a comparison of the work performed, it would have to show substantial equality. *Gunther*, 623 F.2d

at 1321. We stated that "because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case." *Id.* Thus, the nursing faculty has failed to establish a Title VII claim on an equal pay for equal work theory for the same reasons that we concluded it failed to establish a prima facie Equal Pay Act claim. *See Piva v. Xerox Corp.*, 654 F.2d 591, 598 (9th Cir. 1981). That payments are different is insufficient alone to establish a prima facie case.

We will not, therefore, infer intent merely from the existence of wage differences between jobs that are only similar. *Gunther* does not require this. The comparability of the jobs, however, can be relevant to determining whether we can infer discriminatory animus. *Gunther* allows a "comparison of somewhat dissimilar jobs." The plaintiff must still ultimately prove intent to discriminate to make out a case of disparate treatment. *See Burdine*, 450 U.S. at 253.

The nursing faculty suggests we interpret *Gunther* as providing for a "comparability plus" test—that is, as requiring only some degree of job comparability plus some combination of factors including direct and circumstantial evidence of discriminatory conduct and pay disparities. This would be, the nursing faculty argues, a sliding scale where the "plus" factors vary in inverse proportion to the degree of comparability shown. We reject the proposal and do not read *Gunther* as providing such a test. *Gunther* explicitly refused to adopt a precise formula for Title VII litigation. 452 U.S. at 181. Such an unwieldly test might allow plaintiffs to bolster inadequate showings of comparability with a confusing potpourri of "plus factors," plunging courts into standardless supervision of employer/employee relations.

The crux of the nursing faculty's case, then, is something more within our competence—namely, the showing of an

inference of discriminatory animus. The magistrate and the district court, after an extensive hearing, found no showing of discriminatory intent or motive and that whatever disparities in pay existed were not due to sex-based treatment. In arguing that the court was clearly erroneous, the nursing faculty submits a collection of: their witnesses' testimony; evidence of an alleged "predisposition" toward discriminatory conduct by various University officials; and various statistics. We now consider those arguments.

The nursing faculty contends that an inference of discriminatory intent follows from the University's failure to cooperate in developing and providing information in response to the discrimination charge and its failure to appoint sufficiently experienced persons to act as women's rights advocates. More than ample evidence shows, however, that the University did cooperate in good faith. It met with the nursing faculty, provided data as to salaries, degrees, and entry dates for nursing faculty, women at the University and representative males, developed studies on its own computers, and initiated new salary studies. The district court found that the University generally worked to improve the status of women employed there and one aspect of its efforts was the formation of an office for equal opportunity for women, organized directly under the University's executive vice-president.[8]

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[8]Part of the nursing faculty's evidence was not admitted as substantive proof, but rather to show that the University was on notice that various groups felt women's issues needed more attention. These were a 1970 report by the Women's Commission of the Associated Students of the University; documents written by the Coordinator of the Women's Caucus, Washington Library Association; a letter on behalf of the University's home economics department; and Reports by the Faculty Senate Subcommittee on Academic Women and the Task Force on Personnel Policy and Practice.

The magistrate found explicity, however, that the University worked to improve the status of women during the time relevant to this lawsuit and that finding was approved and adopted by the district court. We cannot say that the finding of the district court is clearly erroneous.

The nursing faculty contends that the all-male composition of the University's three-person budget committee bolsters an inference of discriminatory animus. However, no evidence showed any discriminatory conduct on their part. In fact, the magistrate's findings established that the School of Nursing salaries were not only kept competitive with other schools, but that the salary base there expanded at a rate faster than that of all but the School of Law.

The nursing faculty also argues that acts of the all-male budget committee forced the School of Nursing to rely heavily on the instructor rank, the lowest paid and lowest voting rank of the faculty. But, extensive evidence showed that the use of the instructor rank was unrelated to sex and justified by legitimate non sex-related factors. The instructor rank enabled the school to hire inexperienced, non-doctorally prepared faculty. No showing was made that other disciplines hired persons of similar backgrounds at higher ranks, nor that the School of Nursing hired any doctorally prepared faculty at the instructor rank. Of the thirty-nine plaintiffs, the three who were doctorally prepared were hired at the level of assistant professor. Other testimony indicated, in fact, that other disciplines hired persons of the same background as teaching assistants, a non-faculty rank.

The nursing faculty next argues that its evidence showed that one of the University's administrators, Dr. Grayston, Vice-President for Health Services, exhibited a "demeaning attitude" toward the nursing profession and the School of Nursing. This attitude, they argue, was merely part of a larger "predisposition to discriminate" that pervaded certain responsible administrators at the University and included "a clear lack of concern for the needs of female faculty members." The extent to which the nursing faculty tries to construct a "pattern or practice" case is unclear from the briefs. However, such pigeon-holing of the nursing faculty's theory is unnecessary because evidence does not prove "more than the mere occurrence of isolated or

'accidental' or sporadic discriminatory acts," nor does it establish that discriminatory treatment is "the [University's] standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336.

The nursing faculty correctly points out that we have said that the "existence of a discriminatory attitude ... tends to establish that it is more likely than not that the University's decision was based on an impermissible criterion, and therefore tends to establish [the plaintiff's] prima facie case." *Lynn*, 656 F.2d at 1343. That citation of *Lynn* does not, however, control these facts. *Lynn* reversed the district court for not adequately investigating the elements of Lynn's prima facie treatment case under *McDonnell Douglas* in a University's tenure decision case. *Id.* at 1342-44. We said, "disdain for women's issues, and a diminished opinion of those who concentrate on those issues," could evidence an attitude which tended to establish Lynn's prima facie case when presented with other evidence relevant to an inference of discriminatory motive. *Id.* at 1343. The district court there found that the tenure decision may have been influenced by such general disdain. *Id.* We emphasized in *Lynn* that "the view we express is a narrow one," *id.* at 1343 n.5. The importance of such a holding in the area of tenure decisions is obvious: where academic judgments should be made on the basis of the individual's qualitative performance, an irrational disdain for women's issues has no part in the deliberation. Nevertheless, in *Lynn*, we reaffirmed our sensitivity to "the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula." *Id.*

The nursing faculty, however, presents insufficient evidence of an endemic discriminatory attitude that would bolster a prima facie case. There is no evidence that the so-called academic disdain for women's issues resulted in any wage discrimination. The testimony of former Dean Leininger that Grayston was "arrogant, authoritarian and

autocratic toward female administrators" or that he was "ill-informed as to the role of academic nursing" or that he disagreed with some of the nursing faculty over the curriculum, without more, is not sufficient to overturn the factual findings entered below. Title VII does not allow plaintiffs to translate their subjective impressions into evidence of discriminatory motivation when those impressions stem from good faith disagreements. Such a rule would squelch any meaningful internal policy debate at the University.

We are similarly unconvinced that the University discriminatorily handled the Nursing School's request for a Ph.D. program, because of a demeaning attitude toward nursing as an academic discipline. The program eventually was approved and the record demonstrates that the nursing faculty failed to prove that the Nursing School's Ph.D. program was treated differently than any other proposals submitted by other schools and departments.

The nursing faculty also contends that the University insituted a series of equity adjustments to amend for "past discrimination" and that this practice is relevant to present discriminatory conduct by the University. The label placed on such payments, however, is not dispositive. The evidence showed these adjustments were part of a policy to pay each discipline's faculty equitably—among themselves and as compared to faculty at other institutions.[9] *Cf. Christensen v. State of Iowa*, 563 F.2d 353, 357 (8th Cir. 1977) (University's good faith attempt to remove wage

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[9]The nursing faculty presents contested evidence that a less discriminatory alternative compensation system exists at another university. This is not relevant to a prima facie case of disparate treatment. Once a plaintiff establishes a prima facie case and the defendant has responded with legitimate, nondiscriminatory reasons for his actions, the plaintiff then has a chance to show the proferred reasons are merely pretextual. *Burdine*, 450 U.S. 248, 254-56. It is at this last stage that such evidence could be relevant.

disparities through special evaluation system not faulted as a violation of Title VII).

Finally, the nursing faculty presented statistical evidence to support its prima facie case of disparate treatment. Generalized statistical evidence can be relevant to an adaptation of the *McDonnell Douglas* criteria for a prima facie case of disparate treatment. *Lynn*, 656 F.2d at 1342 (generalized statistics relevant to individual's prima facie case because tenure decisions in academic context are highly subjective). *See also O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866 (9th Cir. 1982) (class action).

The Supreme Court has said that, in treatment cases, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters*, 431 U.S. 324, 335 n.15. Statistics may be part of the circumstantial proof bolstering such an inference. The statistics must clearly show the differences in treatment, thus their usefulness "depends on all of the surrounding facts and circumstances." *Id.* at 340. For example, the probative force of the statistics can be reinforced with testimony of experiences of discriminatory treatment of individuals to bring "the cold numbers convincingly to life." *Id.* at 339. Of course, if the plaintiff only presents the circumstantial evidence of statistics in lieu of all other proof of discriminatory intent, the case becomes a case of disparate impact.

Granting that statistics "when properly authenticated, constitute an accepted form of circumstantial evidence of discrimination," *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 645 (4th Cir. 1983), we are still sobered by warnings that statistical evidence has an "inherently slippery nature," *Wilkins v. University of Houston*, 654 F.2d 388, 395 (5th Cir. 1981), *vacated and remanded*, ____ U.S. ____,103 S. Ct. 34 (1982), *aff'd on remand*, 695, F.2d 134 (5th Cir. 1983), and "can be exaggerated, oversimplified, or distorted to create support for a position that is not otherwise supported by the evidence." Note, *Judicial Re-*

finement of Statistical Evidence in Title VII Cases, 13 Conn. L. Rev. 515, 525 (1981). Thus, the weight of statistical proof relies implicitly on "the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination." *White v. city of San Diego*, 605 F.2d at 460, *quoting United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

Because we have already found that the nursing faculty's statistics do not show substantial equality of the jobs in question, we must evaluate the extent to which those statistics show comparability and then to what extent that comparability showing, along with other evidence of discriminatory animus, supports an inference of illegally discriminatory motive.

Statistics may not be any the less rigorous simply because they only go to comparability and not to substantial equality. This is especially true when we are asked not only to take them for what they mean, but also to draw an inference from them as to motive. The nursing faculty's statistics are not general so much as they are strictly comparative: they compare salaries across jobs within the University that their experts have already chosen as comparable and make no comparisons with other universities or the labor market in general. The validity or usefulness of such comparative statistics therefore rests directly on their capacity to single out the factors that convert merely different treatment into unjustified discriminatory treatment. The more sophisticated the method of algebraic adjustment that is used, such as multivariate regression analysis, the more likely an illicit discriminatory factor can be ferreted out. *See generally* Baldus and Cole, Statistical Proof of Discrimination (Supp. 1983); Fisher, *Multiple Regression in Legal Proceedings*, 80 Col. L. Rev. 702, 702, 705 (1980) ("Multiple regression analysis is a device for making precise and quantitative estimates of the effects of different factors on some variable of interest . . . to extract a systematic signal from the noise presented by data").

Intuitively, evidence of a pay disparity between jobs that are only comparable says very little about discrimination. We refuse to specify exactly what role such comparative statistics play, however, because the nursing faculty's statistics are so rife with unreliability that they are a poor vehicle for such a purpose. The nursing faculty's statistics were compiled by a paralegal services company that did not use a regression model but only apparently, a simple matching technique. The selection of comparable faculty in other departments unrealistically assumed the equality of all master's degrees, ignored job experience prior to University employment and ignored detailed analysis of day-to-day responsibilities. Finally, the nursing faculty's statistics never compared female nursing wages to wages of *female* faculty in other departments. Without such a comparison, we have no meaningful way of determining just how much of the proposed wage differential was due to sex and how much was due to discipline. The statistics were generated from input that failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently. *Cf. Agarwal v. Arthur G. McKee and Co.*, 19 FEP Cases 503, 512 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981) (plaintiffs' statistical study ignored similar essential factors); *Valentino v. U.S. Postal Service*, 511 F. Supp. 917, 957 (D.D.C. 1981), *aff'd*, 674 F.2d 56 (D.C. Cir. 1982); *Vuyanich v. Republic National Bank of Dallas*, 505 F. Supp. 224, 280 (N.D. Tex. 1980); *Keely v. Westinghouse Electric Corp.*, 404 F. Supp. 573 (E.D. Mo. 1975). Further, the faultiness of the nursing faculty's database amplifies the effect of this methodological deficiency. The data base was built on information derived from the President's record cards, which, ample testimony and exhibits showed, were inaccurate.

The nursing faculty responds that expert testimony reinforced its methodology. That argument, however, is wholly unconvincing. Dr. Lieberman, the nursing faculty's expert, presented no specific support for the statistical methodology, was not an expert on the application of

statistical studies to sex discrimination, and presented a conclusion that rested in part on the unreliable statistics. Leininger's testimony that "there is a commonality in terms of social and helping process" and a "close interdigitation" between some of the disciplines based on joint conferences and seminars, with no other identification of specific duties and responsibilities, breathes no life into the nursing faculty's statistical proof.

B.

The nursing faculty also argues that it presented a prima facie case of discrimination under the disparate impact theory, first promulgated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (*Griggs*) (application of general intelligence test to minority group). Explaining the theory's boundaries, the Court said that Title VII protects people from "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." It does not mandate special employment treatment for "any person . . . simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs*, 401 U.S. at 430-31.

A showing of discriminatory animus is replaced under this theory by a showing of disproportionate impact, on a member of a group protected under Title VII, by an employer's facially neutral practice. *Heagney*, 642 F.2d at 1163. Where applicable, the elements of a prima facie case under the most general formulation of the disparate impact model are: (1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular sex produced by the employer's facially neutral acts or practices. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Moore*, 708 F.2d at 481; *Heagney*, 642 F.2d at 1163.

Under this model, the nursing faculty avoids proving discriminatory animus and benefits by being enabled "to shift a substantial burden to the employer upon establish-

ing a prima facie case," *Gay v. Waiters' and Dairy Lunchmen*, 694 F.2d at 537; *Contreras*, 656 F.2d at 1271. The benefit however is "weighed against the requirements of a prima facie disparate impact case, which are in some respects more exacting than those of a disparate treatment case." *Moore*, 708 F.2d at 482. Plaintiffs must prove not merely circumstances raising an inference of discriminatory impact; they must prove the discriminatory impact at issue, *Moore*, 708 F.2d at 482 (involving impace showing with respect to promotion policy); *see also Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S. Ct. 293 (1982).

Gunther, a disparate treatment case, offers no help in evaluating the nursing faculty's impact claim. The nursing faculty has only the "comparable worth" theory upon which to rely. *See, e.g., Power v. Barry County* 539 F. Supp. 721, 722 (W.D. Mich. 1982) (defining comparable worth theory). Its case essentially becomes a claim that the nursing faculty received unequal pay for comparable work of equal value to its employer.

The nursing faculty's impact case is simply stated: they have shown a disparate impact by showing a wage disparity between only comparable jobs and this disparate impact is caused by the facially neutral policy or practice of the University of setting wages according to market prices for jobs in the disciplines. We confront then the difficult question whether the disparate impact model is available to plaintiffs who, as the nursing faculty here, make a broad-ranging sex-based claim of wage discrimination, based on comparable worth.[10]

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[10]The controversial "comparable worth" theory essentially holds that men, women and minorities should be paid equally for jobs that are of comparable value to the employer. "At its broadest, 'comparable worth' encompasses any claim for sex-based wage discrimination . . . in which the plaintiff does not perform work 'substantially equal' to that of a higher paid employee of the opposite sex." Schlei and Grossman,

Doubtless because "an increasing patina of subtlety and complexity has obscured alleged claims of sex discrimination," *Bryant v. International Schools Services, Inc.*, 675 F.2d 562, 565 (3d Cir. 1982) (challenge to policy giving unequal employment benefits to people hired to work in Iran), we must be sensitive to Title VII's broad remedial purview, especially when employers use "artificial, arbitrary and unnecessary barriers to employment ... invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431. However, the nursing faculty asks for an extension of Title VII that would plunge us into uncharted and treacherous areas.

We hold that on facts such as these, where plaintiffs' sex-discimination claim is a wide-ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact. *Accord Power v. Barry County*, 539 F. Supp. at 726 (rejecting comparable worth theory in suit by female members at sheriff's office: "a review of the

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Employment Discrimination Law 475 (2d ed. 1983). This value to the employer, some argue, can be objectively measured. The market does not accurately portray that value because of defects in the market caused by pervasive discrimination. *Compare* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J. L. Ref. 397 (1979) (same) *with* Nelson, Opton and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J. L. Ref. 233 (1980) (no social science technique exists to show that residual wage differentials are, in fact, sex-based). Comparable worth theorists have also attempted to argue that discriminatory practices in the labor market are ultimately inefficient because not job-related. This, of course, can be said only based on the belief that the market *is* defective. *See* Note, *Equal Pay, Comparable Work and Job Evaluation*, 90 Yale L. J. 657, 672 (1981). *But cf.* Beller, *The Economics of Enforcement of An Antidiscrimination Law: Title VII of the Civil Rights Act of 1964*, 21 J. L. and Econ. 359 (1978) (empirical analysis suggests that laws cannot eliminate both sex and wage discrimination because conflicting provisions simultaneously increase and decrease relative employment of the protected group, with a cancelling-out effect).

legislative history of Title VII . . ." led the court there to conclude that *Gunther's* "recognition of intentional discrimination may well signal the outer limit of legal theories cognizable under Title VII."). This conclusion is supported by considerations of precedent, prudence and judicial competence, *see generally* Note, *Sex-Based Wage Discrimination Under The Title VII Disparate Impact Doctrine*, 34 Stan. L. Rev. 1083 (1982) (surveying cases and presenting arguments why courts should deny disparate impact claims based on comparable worth theories); Nelson, Opton, and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 233 (1980) (explaining problems of comparable worth theory as a legal vehicle), and accords with the law and goals of Title VII. We so hold without making any broad statement as to the general availability of the impact model in other broad based sex-wage cases.

Other courts have compellingly rejected the comparable worth theory in sex-based wage discrimination claims under an impact theory. Those cases involve claims by the employer, as here, that it was paying market wages. For instance, in *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980), several city-employed nurses sued in a class action to require the City to pay them equally with comparable jobs in the community.[11] Denver set its pay by the market wages of nurses in the community. The court held that Title VII did not require employers "to ignore the market in setting wage rates for genuinely different work classifications." *Id.*

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[11]The nurses in *Lemons* did not want to be paid as nurses in the community were paid because, they argued, the local market price for nurses was depressed because of past social discrimination. The nursing faculty's arguments here also rely on their historically depressed wages being due to discrimination in an imperfect market. Courts are not competent to engage in a sweeping revision of market wage rates. *Cf. Christensen v. State of Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) (Title VII not intended to abrogate the laws of supply and demand).

at 229, *quoting Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977) (*Christensen*). The court also said that existing authority did not require the city and county "to reassess the worth of services in each position in relation to all others." *Id.* at 229. When the Supreme Court stressed that *Gunther* was not a case involving comparisons of the work in question, the Court distinguished *Lemons* precisely as a case which did. 452 U.S. at 166 n.7. The case before us is on all fours with *Lemons*.

Christensen involved a similar comparable worth claim by female clerical employees against the University of Northern Iowa. The University referred to wages in the local labor market to set wages. The plaintiffs argued they were underpaid vis-a-vis comparable males who were doing jobs of equal value to the University, and that reliance on the local wage market simply perpetuated their depressed wages. Without reaching the Bennett Amendment issue eventually addressed by the Supreme Court in *Gunther*, the court held that the plaintiffs failed to establish a prima facie case that the wage disparity was caused by sex discrimination. 563 F.2d at 355. It stressed that "[t]he federal policy embodied in Title VII is that individuals should be entitled to equal *opportunities*" in the job market, not equal results. *Id.* at 356.

We agree with *Lemons* and *Christensen* and join those courts in refusing to accept a construction of Title VII allowing the nursing faculty to establish a prima facie violation of that Act "whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market." *Christensen*, 563 F.2d at 356.

The case before us simply does not fit into the disparate impact model. The model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related, such as: employers' intelligence tests which adversely affect minority persons, *e.g.*, *Griggs;*

height and weight or other requirements affecting those of a certain sex, *e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (policy requring commencement of leave upon pregnancy), or policies which exclude applicants based on arrest record, *e.g.*, *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972). *See also* Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17 (discussing *Griggs* and progeny). As the court in *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982) (*Pouncy*), made clear:

> [t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.

The nursing faculty unconvincingly cites cases for the proposition that "the disparate impact analysis has been applied to wage discrimination cases." They do not involve wide-ranging allegations challenging general wage policies but rather challenges to specific employer practices, namely, fringe benefits policies, with respect to which employers exercise judgment. The rules by which an employer determines the availability of fringe benefits can be evaluated in terms of their job-relatedness. It has been such "selection procedures to which the disparate impact model has traditionally applied," *Pouncy*, 668 F.2d at 801, and not the mere payment of market wages.

In *Arizona Governing Committe for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, ____ U.S. ____, 103 S. Ct. 3492 (July 6, 1983), *aff'g in part, rev'g in part*, 671 F.2d 330 (9th Cir. 1982), for instance, the employer's policy of providing retirement benefits based on sex-segregated annuity tables was challenged. The Court held that discrimination proscribed by Title VII occurs where an employer's policy is to offer female employees a benefit

plan requiring them to make the same contributions as male employers, yet receive lower benefits. *Id.* at 3499, 3501. *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), also involved sex-segregation under a benefits plan.

Our opinion in *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492 (9th Cir. 1983), also involved a specific employer policy, and is not contrary to our holding here. *Wambheim*, a class action, narrowly held that "disparate impact analysis is appropriate in this § 703(a)(1) case" where Wambheim and her class challenged Penney's "head-of-household" rule under its medical and dental insurance coverage, and that plaintiffs successfully established a prima facie case. 705 F.2d at 1494. That case we found "unusual" because it involved an allegation of violations under section 703(a)(1): discrimination with respect to "compensation, terms, conditions, or privileges of employment," whereas the disparate impact theory had been developed in section 703(a)(2) cases. However *Wambheim* is inapposite here because it also specifically dealt with a particular employer policy rather than a full-scale assault on the employer's salary practices.

We cannot manageably apply the impact model when the kernel of the plaintiff's theory is comparable worth. The problem is compounded in this case. When the disparate impact model is removed from the cases involving challenges to clearly delineated neutral policies of employers, it becomes so vague as to be inapplicable. *See Pouncy*, 668 F.2d at 801. The nursing faculty claims to have pinpointed a facially neutral policy at the University having the discriminatory impact they assert. That policy is the University's relying on the market to set their wages. We find that they have failed to do so, and emphasize that such a practice is not the sort of "policy" at which disparate impact analysis is aimed.

Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the

disparate impact analysis that was first articulated in *Griggs*. For Title VII purposes, simply labelling an employer's action a "policy or practice" is not sufficient. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment.

Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, "pricetakers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense. Fringe policies, which are discretionary, are altogether another matter. Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment. As we have previously said, "... Title VII does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combatting culpable discrimination. In disparate impact cases, culpable discrimination takes the form of business decisions that have a discriminatory impact and are not justified by their job-relatedness." *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981) (use of allegedly discriminatory auditor's examinations challenged).

The nursing faculty asserts it has shown three other facially neutral policies as a foundation for impact analysis here. The nursing faculty argues that the University had a facially neutral policy of making all salary increases in percentages of present salaries. The evidence, however, shows that the disciplines at the University were not in a lock-step for the purpose of percentage pay increases, and that part of the appropriated money from the state legisla-

ture was sometimes allocated in varying percentages. On some occasions, the nursing faculty received greater percentage increases.

The nursing faculty also contends the University had the practice of requiring nursing faculty to start as "instructors" and progress through a four-rank promotional system. However, ample evidence showed that members of the nursing faculty were not required to begin as instructors, and the entry rank depended on the person's prior teaching experience, published research or outstanding professional accomplishments.

The final facially neutral policy alleged is the University's "discretionary budgeting policies based on subjective considerations." We fail to see how this qualifies as a facially neutral policy, even if it were proved. Ordinarily, the lack of well-defined criteria as facilitating wage discrimination is a claim better presented under the disparate treatment model. *See Heagney*, 642 F.2d at 1163 (treatment model more appropriate where gravamen of plaintiff's claim goes to the use of subjective criteria); *Pouncy*, 668 F.2d at 801; *but cf. Hung Ping Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982 (lack of objective criteria and a job promotion disparity may be basis for impact claim).

VI

We also affirm as to Ruth Fine's claim under Title VII. As we held above, she failed to prove substantially equal work. Thus, she must make out a case of intentional discrimination with other evidence and the comparability of her job with Lang and Stein. There is no evidence before us, however, which creates an inference of intentionally discriminatory treatment suffered at the hands of the University. She also presented no evidence of disparate impact.

VII

The nursing faculty next asserts that Reg Williams, the male faculty member, has a valid claim for discrimination

because he received a salary "infected" by the discrimination the female faculty members suffered. However, even where the female faculty members are able to frame a cognizable Title VII of Equal Pay Act claim, it does not allow the male employees "to bootstrap their job grievances ... into an employment discrimination claim rooted in federal law." *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1281 (9th Cir.), *cert. denied*, 445 U.S. 951 (1979) (sex-based wage discrimination suit brought by male officers dismissed on summary judgment). There we held "that the County's past employment practices as to its female deputy-sheriffs, however ill-conceived, did not serve as a foundation for this suit brought under Title VII and the Equal Pay Act." *Id.* at 1281. Williams make no claim that he received a lower wage because of his sex.

VIII

In light of the above, there is no reason to disturb the district court's denial of attorneys' fees.

AFFIRMED.

SPECIAL CONCURRENCE

SCHROEDER, *Circuit Judge*

RE: **Spaulding v. University of Washington. No. 82-3038**

Filed In The
U.S. Court of Appeals
Phillip B. Winberry Clerk,
July 3, 1984

I agree with the majority that the plaintiffs in this case did not prove any violation of the Equal Pay Act because they failed to show that their jobs were substantially equal to the comparator jobs used. *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981). For the same reason, their Title VII claim based on alleged unequal pay must fail. *Id.*

I also agree that plaintiffs failed to prove a violation of Title VII on disparate treatment grounds. They made no prima facie showing that any university action was based upon an unlawfully discriminatory criterion. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1340-41 (9th Cir. 1981); *Hagans v. Andrus*, 651 F.2d 622, 625 (9th Cir. 1981). Although plaintiffs established a discriminatory attitude on the part of one official of the University, through evidence of disparaging comments by the Vice President of the Health Sciences Center, the animus remained ephemeral. There was no connection between his attitude and any wage decisions suggesting disparate treatment.

I also agree that the nurses failed to make a prima facie case of discrimination using an adverse impact analysis. This is because they never attempted to show that any of the facially neutral practices of which they complain had a disparate impact upon women university faculty members as opposed to male faculty members. *See Griggs v. Duke*

Power Co., 401 U.S. 424 (1971). At best, they showed only that members of the nursing faculty were paid less than some male faculty members in other fields.

The plaintiffs' fate in this appeal is more a product of history than of any demonstrated unworthiness of their cause. This case was filed in 1974 and tried in 1977. All of the evidence was received before this court's historic decision in *Gunther*, the first appellate opinion to recognize that a sex based wage discrimination claim could be proved in any way other than a showing of unequal pay for substantially equal work. The magistrate's and district court's decisions were made years before the Supreme Court acknowledged the existence, if not the validity, of a comparable worth theory when it affirmed our decision. *County of Washington v. Gunther*, 452 U.S. 161, 166 (1981).

Plaintiffs' counsel cannot be faulted for a lack of prescience in this regard, for the explosion in debate over comparable worth began after our decision in *Gunther*. *See County of Washington v. Gunther*, 452 U.S. at 166 n.6. Thus, it is no surprise that this case, like most cases of its vintage, was tried only on the theory that the nurses' work was substantially equal or, as plaintiff phrased it, sufficiently comparable, to establish wage discrimination on the basis of sex.

I therefore cannot join in the majority's analysis of the adverse impact issue. It confusingly meshes adverse impact with varying concepts of comparable worth. The confusion is evident in footnote ten of the majority opinion, in which the majority fails even to define what it means by "comparable worth." The parties did not present any evidence of the worth of nursing faculty jobs in comparison to the worth of other university employee jobs. The only comparisons were of "work"—not "worth." The district court removed from its final findings of fact and conclusions of law the magistrate's observation that nurses might well be being paid less than they were worth. In their brief to this court, the plaintiffs repeatedly disclaim having pre-

sented any comparable worth theory. It is thus not possible for this court in this case to render any definitive ruling on the validity of comparable worth as a tool in employment discrimination cases.

For similar reasons, I cannot join in the majority's discussion of the appropriateness of a theory of "comparability plus" in a wage discrimination case. A fair evaluation of that concept's utility in this, or any other case, is impossible because the theory was presented neither to the magistrate when he considered the evidence nor to the district court when it reviewed the post trial briefs.

I concur in the majority opinion on the remainder of the issues.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C74-91M

MARGARET SPAULDING, *et al.*, *Plaintiffs*

vs.

UNIVERSITY OF WASHINGTON, *Defendant.*

ORDER ADOPTING RECOMMENDATIONS OF SPECIALMASTER AND DISMISSING ACTION UNDER RULE 41(b)

Filed In The
United States District Court
Western District of Washington
Bruce Rifkin, Clerk
December 17, 1981

This is a discrimination in wages action brought pursuant to the Equal Pay Act, 29 U.S.C. § 206(b), the Civil Rights Act of 1871, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The plaintiffs and intervenors are or have been members of the faculty of the University of Washington School of Nursing. They allege that because of their sex, faculty women in the School of Nursing have received substantially less pay than male faculty elsewhere in the University for substantially equal work.

The action was tried before the United States Magistrate over a period of approximately 13 days in May and June 1979. Following the plaintiffs' case, the defendant moved for involuntary dismissal pursuant to Rule 41(b), Federal Rules of Civil Procedure. After hearing oral argument, the magistrate, on June 20, 1979, announced his

decision to recommend that the Rule 41(b) motion be granted and judgment entered dismissing the complaint with prejudice. On October 24, 1980, the magistrate filed his "Report of Special Master" and "Recommended Findings of Fact and Conclusions of Law."

The Court must accept the special master's findings of fact unless clearly erroneous. The plaintiffs' argument that a *de novo* determination is required of those portions of the report or specified proposed findings or recommendations to which objection is made is not well taken.

The instant reference was made pursuant to 42 U.S.C. § 2000e-5(f)(5) and Rule 53, Federal Rules of Civil Procedure, whereby a "clearly erroneous" standard of review is applicable. *White v. G.S.A.*, 26 E.P.D. § 32,029 (9th Cir. 1981). *White* at page 21,652 states:

> We therefore view the citation to Rule 53 in § 2000e-5(f)(5) as manifesting congressional intent to incorporate all of the rule except the severe restrictions upon reference.

The reference in this instance was not made under 28 U.S.C. § 636(b)(3) with the *de novo* standard for the review of dispositive matters and the clearly erroneous standard for the review of non-dispositive matters provided for in 28 U.S.C. § 636(b)(1)(A)-(C).

The Court has considered the entire record, including but not limited to the trial briefs, the addenda and replies thereto, the pretrial order, the transcript of the trial of the action and the exhibits admitted therein, the transcript of the Rule 41(b) hearing before the special master on June 20, 1979, the report, findings of fact and conclusions of law recommended by the special master. The Court has also considered the plaintiffs' objections thereto, together with the argument and authorities advanced in support of and in opposition to the proposed findings and conclusions, and the memoranda concerning the applicability herein of *County of Washington v. Gunther*, 101 S.Ct. 2242 (1981), said memoranda having been submitted to the special master,

both before and after the Supreme Court affirmed the decision of the Court of Appeals for the Ninth Circuit on June 8, 1981.

Having considered the evidence admitted at trial in the light most favorable to the plaintiffs, it is the opinion of the Court that the recommendations of the special master must be approved and adopted with but slight modifications, and that the Rule 41(b) motion of the defendant to dismiss the action with prejudice must be granted.

Findings of Fact numbers 1 through 12 recommended by the special master without objection are not clearly erroneous. Findings 1 throught 12 are approved and adopted by the Court.

Findings 13 through 21 recite certain organizational features of the University and the School of Nursing, including a broad enumeration of the academic components of the University (FF 13), procedures for initial faculty appointments (FF 15), procedures for promotion (FF 16), for salary increases within a school or college (FF 17), the role of the state legislature and the central University administration in the allocation of salary increases (FF 18), and the distribution of across-the-board and merit salary increases at the school or college level (FF 21).

The plaintiffs challenge the above-specified findings as incomplete (FF 13), as misleading because incomplete (FF 15, 16, 17, 18 and 21), and by reason of what is implied (FF 17, 18 and 21).

The Court accepts and adopts Findings 13 through 21. They are not clearly erroneous, either in what they recite, what they do not recite or what they may reasonably be understood to imply.

Findings 22 through 42 recite some of the historical antecedents to the instant lawsuit, including the perception of the nursing profession as separate and distinct in its subject matter, training and expertise (FF 22) and the

March 14, 1972 filing of a sex discrimination petition with the University by many School of Nursing faculty (FF 27). The findings also include the University's subsequent advice to petitioners that (1) to compare one discipline's average salary with the composite average salaries of all University faculties was inappropriate, (2) each discipline commanded its own salary levels depending upon the academic marketplace for that discipline, (3) a study of School of Nursing salaries would be requested to determine whether School of Nursing salaries lagged further behind School of Nursing salaries elsewhere than did the salaries of other faculties at the University when measured against their counterparts at other universities (FF 30), the University's efforts to keep its salaries in each discipline competitive with the national marketplace for each discipline, and the lack of evidence that the lag in School of Nursing salaries at the University behind salaries at comparable schools of nursing is sex-related, rather than a part of the University-wide lag in faculty salaries as compared with faculty salaries at other universities (FF 34). Those findings also stated that there is no showing that the salaries in the School of Nursing are further behind than the salaries of other disciplines at the University when compared with their counterparts among the universities with which the University of Washington traditionally has compared itself (FF 35). Additionally the findings state that through the summer and fall of 1972, the School of Nursing faculty met to discuss the petition and related issues, although the record does not indicate who participated or otherwise continued to express interest in the petition (FF 36). The findings indicate that the record is silent as to which faculty members, if any, responded to the November 27, 1972, solicitation of the Women's Salary Inequity Committee (WSIC), which Committee included eight of the instant plaintiffs; apparently some other faculty members participated at other times in the Committee's efforts, but there is no evidence regarding the degree or consistency of their involvement (FF 39), when

in the spring of 1973 the WSIC filed a charge with the University's Human Rights Commission, the petitioners and the University attempted to develop supplemental information for purposes of a hearing (FF 40), the University's response to the above-mentioned charge was not unreasonable, and there is no evidence that the University's response was sex-related, nor can any inference be drawn that the University's response reflected a discriminatory animus (FF 41).

The plaintiffs' opposition to FF 22 proves too little. Conceding that while nursing might be considered a separate and distinct discipline, plaintiffs argue nursing's "strong" similarities with other disciplines.

Assuming without deciding that the record before the Court would permit a finding that the subject matter, training and expertise of nursing are in certain respects similar to the subject matter, training and expertise of other disciplines, there is in this record overwhelming evidence that the subject matter, training and expertise of nursing is dissimilar to the subject matter, training and expertise of other disciplines, including those which plaintiffs describe as "related" to nursing. Those differences are in no way diminished by reason of the fact that nursing faculty have academic degrees in other fields, teach in other schools or colleges, or hold joint faculty appointments.

The suggestion that disciplines are alike because "academic nurses do exactly what their collegues in other departments do, teach, do research and write," contributes nothing to the resolution of the serious issues disputed in the case at bar.

Finding 30 records that Dr. Grayston and Dr. Katz advised the petitioners, *inter alia*, that it is not appropriate to compare one discipline's average salary with the composite average salaries of all faculties at the University. Finding 30 records further that the approach of the petitioning nurses was to the contrary. Finding 30 is not clearly

erroneous because it fails to report Dean de Tornyay's opinion that "School of Nursing professor salaries should at least be comparable to that of the general university."

The plaintiffs challenge Findings 34 and 35 as implying that the salaries of the nursing faculty as [sic] the University "have consistently kept pace" with nursing faculty salaries elsewhere, or that the lag in nursing faculty salaries at the University, when compared with nursing faculty salaries elsewhere is relatively the same as the lag in University faculty salaries generally when compared with faculty salaries at other institutions.

Findings 34 and 35 do not report or imply parity between faculty salaries at the University and faculty salaries elsewhere. On the contrary, they report a "traditional" disparity in that respect, and the University's "attempts" to keep its faculty salaries competitive nationwide.

Finding 35 reports no showing that the salaries in the School of Nursing are further behind than are the salaries of other disciplines at the University when compared with their counterparts among the universities with which the University of Washington has traditionally compared itself.

Dean Leininger testified that in 1969 nursing faculty salaries at the University were considerably lower than nursing faculty salaries elsewhere. Finding 32 reports that in 1972 faculty salaries at the University lagged 9% behind faculty salaries in comparable institutions, while average salaries in the School of Nursing lagged 10.9% behind salaries in comparable schools of nursing. Finding 33 reports an increase in nursing faculty salaries in 1972. Plaintiffs' Exhibit 155, at pages 3 and 4, reports the probability that by 1976-77 nursing faculty salaries at the University compared more favorably with nursing faculty salaries at other institutions than did the salaries of other schools and colleges in the University.

Findings 34 and 35 are not clearly erroneous.

Finding 36 reports that petitioners held several meetings "through the summer and fall of 1972," but that "there is no indication who participated or otherwise continued to express interest in the petition."

Susan Poulsen testified that she became an active volunteer in January 1972 (TR V 105) and that she was active during the entire period of Dr. Nakagawa's absence from the University, namely from August 1972 until January 1973 (TR V 107). Poulsen testified that the Salary Inequity Committee received a copy of Dr. Grayston's letter dated July 10, 1972, and that the group drafted a response to Dr. Grayston dated August 4, 1972 (Ex. 34). Poulsen testified that volunteer members of the group met, drafted and distributed written status reports to the nursing school faculty of the nature of Exhibit A-39, dated November 27, 1972, and that the group drafted and filed with the Civil Rights Division, HEW, a complaint dated November 29, 1972 (Ex. 36).

The finding that there is no indication who participated in petition activity through the summer and fall of 1972 is clearly erroneous, and accordingly is deleted from Finding 36. Such deletion does not, however, lead to any conclusion of law contrary to those recommended by the magistrate.

The plaintiffs' attack on Finding 39 is wide of the mark. Finding 39 does not state or imply that nursing faculty support for the petition has been either inconsistent or insubstantial

The Women's Salary Inequity Committee filed its grievance with the University of Washington's Human Rights Commission on February 14, 1973. There was testimony and considerable documentary evidence at trial relative to proceedings before that Commission. Finding 41 records the determination of the trier of fact that the defendant's response before the Commission was neither unreasonable nor did it reflect a discriminatory animus. His statement that there was no evidence of anything other than a bona

fide disagreement of the parties is correctly determined to be a finding of "bona-fideness" rather than an absence of adverse contentions or evidence. Those findings are not clearly erroneous.

The Court accepts and adopts Findings 22 through 35, 36 as modified and 37 through 42.

Findings 43 through 52 recite certain factual determinations concerning the prerequisites for nursing faculty employment (FF 43, 45), the characteristics of nursing school instruction and research (FF 44), the insufficiency of the evidence of substantial equality between the work done by plaintiffs and the work done by male faculty in other schools or colleges of the University (FF 46, 47). Those findings also concern the separate professional status of faculty in the various schools and colleges (FF 48), the difference in disciplines based upon different subject matter, expertise and emphasis on research, teaching and community service (FF 49) and the argument that interdisciplinary work is substantially equal work (FF 50). They further relate to the treatment of male and female nursing faculty respectively, with regard to salary, promotion and tenure (FF 51), and the absence of allegations that plaintiffs were denied faculty positions in other schools and colleges of the University (FF 52).

Findings 44 and 45 are neither incomplete, misleading nor clearly erroneous because several plaintiffs teach in fields other than nursing. The evidence before the Court viewed in its entirety establishes that interdisciplinary programs combine related but separate disciplines.

The evidence, including but not limited to the evidence as to the subject matter and instructional objectives of the disciplines considered permits the Court to accept and adopt Findings 46 and 47, *i.e.*, that the work done by plaintiffs is, broadly speaking, comparable, but not substantially equal to the work done by male faculty in other schools and colleges.

In objecting to Finding 48 plaintiffs offer nothing of substance in support of their assertion that faculty members working outside their disciplines do not always work as members of separate professional groups. Again, the evidence is clear that interdisciplinary programs combine related but separate disciplines.

Finding 49 explores the difference in disciplines at the University. It is supported by substantial evidence and is not clearly erroneous. It is consistent with the application either University-wide or within a given school of standard criteria in faculty evaluation, which go to performance, to the quality of teaching, research and community service, not to the subject matter of a particular discipline.

The evidence shows that some plaintiffs participate in academic programs which combine related but separate disciplines. Finding 50 recites that the evidence is insufficient to establish that faculty who participate in interdisciplinary programs do substantially equal work. That finding is not clearly erroneous.

The Court accepts and adopts Findings 43 through 52.

Findings 53 to 64 recite certain facts concerning the influence of market considerations on faculty salary levels within particular disciplines (FF 53), the absence of any evidence that the University uses market considerations to conceal wage discrimination against female nursing faculty based on sex (FF 54), the success of the University in maintaining and upgrading at existing salary levels a quality nursing faculty with no more difficulty than any other school or department (FF 55), the reliance of the University on market conditions rather than sex in determining salary levels (FF 56), the effort of the University to compensate faculty equitably within disciplines and in comparison with other institutions (FF 57), the University's use of "equity adjustments" within schools and colleges, including the School of Nursing, such salary increases being awarded on the basis of merit and parity (FF 58), the

University's allocation of merit funds to the nursing faculty at various times since 1970, for the purpose of bringing nursing faculty salaries in line with the University's "average deficit" in faculty salaries, vis-a-vis other institutions, the University treating the School of Nursing in this respect as well or better than it has treated other schools (FF 59), the influence of market considerations on the University of California's step scales system in setting salaries (FF 60), some components of the salary scales systems at the University of California (FF 61), the influence of market considerations on faculty salaries at the University of California (FF 62), the absence of any showing that the salary system used at the University of California is any less likely to result in sex discrimination than that used by the University of Washington (FF 63), society's probable underevaluation of the nursing profession and the impossibility of measuring either the role of sex in the process, or the extent of the impact of society's historical attitudes on the salaries of nurses (FF 64).

The evidence before the Court is overwhelming that market conditions are far and away the dominant factor in determining faculty salary levels at major academic institutions including the University of Washington and the universities with which it has traditionally compared itself. Finding 53 is not clearly erroneous.

There was no showing that the University is less competitive in the nursing faculty market than elsewhere. There was no evidence that the University's reliance on market conditions in setting nursing faculty salary levels is a pretext for discrimination based on sex.

The differences in faculty salary levels from discipline to discipline, so heavily relied on by the plaintiffs, without more, fail to make out a case of sex discrimination under the authorities advanced. The testimony of Dr. Lieberman that those differences can be explained only on the basis of sex discrimination is not supported by the evidence. Findings 54 and 56 are not clearly erroneous.

That the University maintained and in fact upgraded the quality of its nursing faculty during the applicable period is supported by the evidence. *See*, for example, the President's cards. *See also* TR VI 98 and Exhibit 90, page 5. While it is relevant to the plaintiffs' claim that the difference between nursing faculty salaries and the salaries of male faculty in other schools and colleges is attributable to discrimination based on sex, it is equally relevant to the University's position that its nursing faculty salaries have been competitive. Finding 55 is not clearly erroneous.

Dr. Cartwright's testimony speaks for itself. Finding 57 is not clearly erroneous.

That equity adjustments in nursing faculty salaries were made, as in 1972 and 1973, in part to bring the deficit in nursing faculty salaries into line with the deficit in faculty salaries University-wide vis-a-vis faculty salaries at other institutions, and that in terms of such allocations, the University has treated the School of Nursing as well or better than it has treated other schools, is supported by the evidence. Findings 58 and 59 are not clearly erroneous.

That faculty salaries at the University of California are influenced by the same market considerations that influence faculty salaries at the University of Washington is supported by the overwhelming weight of the evidence. Findings 60, 61 and 62 are not clearly erroneous.

Citing the testimony of Dean de Tornyay at TR III 195 and that of Dr. Blakely at TR IX 38, plaintiffs challenge Finding 63 as contrary to the evidence. That testimony at best provides guarded support for plaintiffs' objection. The evidence is on the issue supports, as much as anything, the inference that the salary system employed at the University of California would affect not whether sex discrimination is [illegible]less likely to occur there than at the University of Washington, but when and how and in what dollar amounts sex discrimination, if any, would occur in the steps scales system. Finding 63 is not clearly erroneous.

Finding 64 when purged of extraneous matters is reduced to the ultimate fact that the special master found the nursing profession at the University of Washington to be not "—undervalued in regards to the disciplines plaintiffs have chosen as comparators." That finding is clearly not erroneous.

Similarly, the special master's inability under the evidence before him "—to isolate or evaluate the role of sex in the process" of society's historical attitudes is also not clearly erroneous.

Findings 53 through 64 are approved and adopted.

Findings 65 to 75 recite certain facts concerning Ruth Fine's employment at the University of Washington Hospital and the School of Nursing (FF 65, 66, 67, 68), Geoffrey Lang's employment at Harborview Hospital (FF 70), Mr. Lang's salary as compared with Ruth Fine's salary (FF 71), the range of Mr. Lang's employment responsibilities as compared with those of Ruth Fine (FF 72), Edward Stein's employment at the University of Washington Hospital (FF 73), the range of his employment responsibilities there (FF 74), and Edward Stein's duties as compared with those of Ruth Fine in terms of skill, effort and responsibility (FF 75).

Findings 65 and 66 are not clearly erroneous, but for purposes of clarity they are modified as follows:

65. Ruth Fine was employed and her salary paid by the University of Washington Hospital from 1958 to 1976. She was Director of Nursing Services from 1962 to 1976 and Associate Administrator from 1969 to 1976.

66. Ruth Fine was a nontenured Assistant Professor in the School of Nursing from 1968 to 1973 and, since 1973, a tenured Associate Professor in the School of Nursing.

Finding 67 is eliminated because redundant by reason of the modifications immediately above.

Findings 68 through 75 are not clearly erroneous and are approved and adopted by the Court.

Findings 76 to 80 relate to the discretion of the dean and faculty of the School of Nursing to hire faculty at the rank of instructor (FF 76), qualifications for entering employment at the rank of instructor in the School of Nursing (FF 76), employment of instructors at the School of Nursing. including many of the plaintiffs, immediately after they obtained their Master's degrees in nursing with no prior relevant experience other than as a staff nurse at a hospital (FF 76), absence of any showing that other disciplines hired persons of similar backgrounds at higher ranks (FF 76), testimony indicating that other disciplines would normally hire persons of this background as teaching assistants (FF 76), evidence that the School of Nursing does not hire faculty with doctorates at the rank of instructor (FF 77), and that the three plaintiffs with doctorates were hired at the rank of assistant professor (FF 80), absence of a showing that the School of Nursing hires faculty at the instructor rank with job-related qualifications equal to faculty members in other schools and colleges at the University who were hired at the rank of assistant professor (FF 78), the existence of legitimate nonsex-related differences which would justify treating plaintiffs who were hired at the instructor rank differently than the assistant professors and associate professors in the comparator departments (FF 78), and the practice of hiring inexperienced non-doctorally prepared faculty at the rank of instructor, as characteristic of the nursing profession throughout the country.

The finding (FF 76) that the decision to hire faculty at the instructor rank is made by the faculty and the dean of the School of Nursing itself and is as a practical matter totally within their control is not clearly erroneous. There is no evidence that funds allocated over the years to the School of Nursing for hiring faculty at the instructor rank have been inadequate for such purposes. There is no

evidence that any recommendation regarding appointments in the School of Nursing has ever been refused or modified by the Board of Health Sciences or the President's office (FF 15).

Further to the plaintiff's objections to Findings 76 through 80, the failure of the special master to find that the University treated fulltime instructors in the School of Nursing as "quasi faculty," is not clearly erroneous. Dr. Cartwright testified that fulltime instructors are important academic faculty (TR II 33). *See also* TR I 51-53.

In their second and last specific objection to Findings 76 through 80, plaintiffs state that a showing was made that other disciplines hired persons with "similar backgrounds" to persons hired as instructors in the School of Nursing, at higher ranks. Similar backgrounds in that the persons hired may each have had master's degrees? Yes, in some instances. But *see* TR II 192-194. In many disciplines, entry normally occurs at the assistant professor level (TR II 9), and a doctor's degree is a prerequisite (TR II 194). Similar backgrounds in that those hired had master's degrees in the same discipline? No. Similar backgrounds in terms of job-related qualifications? No. *See* TR II 20, line 12.

Entry level differences between relevant disciplines, as to rank and salary, indeed salary differences of veteran faculty between relevant disciplines are material to this lawsuit only if those salaries constitute unequal pay for equal work. That such differences are attributable to nondiscriminatory considerations is the defendant's basic contention in defending this action. The final sentence of Finding 78 relates to that defense.

Findings 76 to 80 are not clearly erroneous. They are approved and adopted by the Court.

The plaintiffs' claim of discrimination based on sex was formalized in 1972. The theory underlying their claim has been and remains clear and unmistakable. Unequal pay for equal work. No less unqualified was the plaintiffs' reliance

at trial upon a computerized study of their salaries vis-a-vis the salaries of selected male faculty in different schools and colleges of the University. That study compared the salaries of the plaintiffs with the salaries of their comparators, having subtracted merit increases and differences attributable to experience. The methodology purported to eliminate every explanation except sex for disparity in pay.

The special master rejected the statistical report as unreliable. Each of the reasons recited in Finding 81 survives the plaintiffs' assignments of error. To those findings the Court adds the following observation.

The study casts a long shadow because among other things, the computer was denied access to facts relevant to its inquiry. The study either ignores the central fact disputed in this lawsuit, which is whether or not the work done by plaintiffs is substantially equal to the work done by male faculty with whom they compare themselves, or it presumes equality.*

The computer knew that it costs the University substantially more to hire someone to teach architecture, for example, than nursing. The computer did not know that faculty in the College of Architecture and Urban Planning are paid more for what they do than nursing faculty with as much training and experience are paid for what they do because society, for some reason, expects to pay more for the services of an architect, male or female, than it does for the services of a nurse.

The study would put plaintiffs and comparators "on an equal footing" save and except as to sex, for purposes of

*Comparator faculty were selected from departments which the plaintiffs deemed comparable to nursing. Mr. Toner testified (TR XII 14) that a comparator's department was put on the computer. That information, however, was not utilized by the computer in comparing, for example, plaintiff Craven and comparator Donnette. *See* plaintiffs' exhibit 232f, pages 2 and 3.

explaining disparity in pay. Society, which perceives what architects, accountants and surgeons do as superior to what nurses do in terms of training and skill, and compensates them accordingly, will not as yet permit it.

Finding 81 is not clearly erroneous. Finding 81 is approved and adopted by the Court.

In 1973 the Graduate School Executive Committee considered a preliminary proposal by the School of Nursing for establishing a Ph.D. program in nursing science. The preliminary proposal was rejected by the Committee. The plaintiffs allege that the decision of the Committee, which was composed entirely of males, evidenced sexual discrimination on the part of the University. Finding 82 reports the determination that a showing of discrimination in this matter had not been made. Finding 82 is not clearly erroneous. It is approved and adopted by the Court.

Finding 83 reports that during the period of time relevant to this lawsuit, the University worked to improve the status of its women. Dr. Cartwright's testimony concerning the University's efforts to develop an effective affirmative action program proves more. Finding 83 is not clearly erroneous and is approved and adopted by the Court.

The plaintiffs alleged that women are underutilized as administrators by the University and that such underutilization is attributable to discrimination based on sex. The special master found (FF 84) no evidence of discriminatory underutilization of women in administration, no showing of the availability of women administrators, and no showing that any woman was precluded from filling an administrative position because of her sex.

Finding 84 is not clearly erroneous and is approved and adopted by the Court.

The plaintiffs' objection to Conclusion of Law No. 1 is not well taken. It is not in and of itself inappropriate for the Court to proceed assuming, rather than finding, that is has jurisdiction under the statutory authority advanced.

The plaintiffs challenge Conclusions of Law 3 through 8 as contrary to the law and the evidence. A modification of Conclusion of Law 7 is in order. Conclusion of Law 7 shall end after the word "professions." That modification made, Conclusions of Law 3 through 8 are correct applications of the law.

The Court approves and adopts recommended Conclusions of Law 1 through 10, including Conclusion 7, as amended. Now, therefore,

IT IS ORDERED that the report, recommendations, findings of fact and conclusions of law of the Special Master be and the same are hereby approved and adopted consistent with the foregoing, and

IT IS ORDERED that defendant's motion for involuntary dismissal under Rule 41(b) is GRANTED and the Clerk is directed to enter judgment dismissing the above-numbered action with prejudice together with the costs to be taxed.

The Clerk shall direct uncertified copies of this order to counsel of record and to the Special Master.

DATED this 17th day of December, 1981.

WALTER T. McGOVERN
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C74-91S

MARGARET SPAULDING, *et al.*, *Plaintiffs*

vs.

UNIVERSITY OF WASHINGTON, *Defendant.*

REPORT OF SPECIAL MASTER

This case was referred to me for trial by the Court's Order of Reference dated August 12, 1977. Trial commenced on May 21, 1979, and presentation of plaintiffs' case continued through May 31 and on June 1, 5, 7, 18 and 19, 1979.

Following the close of plaintiffs' case, defendant moved for involuntary dismissal pursuant to Fed. R. Civ. Proc. 41(b). After hearing argument I orally advised the parties that I would recommend that the Rule 41(b) motion be granted and judgment entered dismissing the complaint with prejudice. Both parties were to submit proposed Findings of Fact and Conclusions of Law for my consideration. The transcript of my oral decision on June 20, 1979, is attached.

In substance, the basis for my conclusion was that the standard of proof under the Equal Pay Act governed the causes of action under both Title VII and 42 U.S.C. § 1983,

and there was absolutely no showing that plaintiffs were performing substantially equal work with the males in other departments of the University with whom they attempted to compare themselves—that at best, plaintiffs had established only that they were performing comparable work which was not the applicable standard of proof.

On August 16, 1979, while findings and conclusion were in the course of preparation, the Ninth Circuit decided the case of *Gunther* v. *County of Washington*, 602 F.2d 882 (1979), *rehearing denied*, 23 E.P.D. 15, 649 (1980). In that case, it was held that Title VII is broader than the Equal Pay Act and that a plaintiff who does not allege performance of substantially equal work is not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by § 703 (h).

Because my oral comments on June 20, 1979, indicated that I believed that the Equal Pay Act standard of proof was applicable to the cause of action under Title VII, a conclusion found to be erroneous under certain circumstances in *Gunther*, on September 12, 1979, I requested that the parties submit memoranda dealing with the applicability of *Gunther* to the facts in the instant case. Also on September 12, 1979, plaintiffs filed a motion requesting that I reconsider my oral decision and instead recommend denial of defendant's Rule 41(b) motion on the basis of the holding in *Gunther*.

On May 1, 1980, the Ninth Circuit denied rehearing in the *Gunther* case, *Gunther* v. *County of Washington*, 23 E.P.D. 15,649 (1980).

I have reviewed both the Ninth Circuit's original decision in *Gunther* and its decision denying rehearing, and conclude that it does not affect my original decision with respect to the facts in this case. I continue to recommend that the Court grant defendant's Rule 41(b) motion and

adopt the Recommended Findings of Fact and Conclusions of Law which I am herewith filing with the Clerk.

A brief review of *Gunther* and what it does not hold is in order. Plaintiffs in *Gunther* were employed as jail matrons in the female section of the Washington County (Oregon) jail. The county also employed higher-paid male guards in the male section of the jail. Plaintiffs sued under Title VII and contended that they were denied equal pay for performing work substantially equal to that performed by the male guards, and that, even if the work were not substantially equal, some of the discrepancy in pay could only be ascribed to sex discrimination. The District Court found that the guards and matrons were not performing substantially equal work. The appellate court affirmed the findings of no substantial equality, but remanded to allow the District Court to consider other evidence which had been presented to show that some of the differences in compensation could only be caused by the employer's sex discrimination.

Plaintiffs contend that *Gunther* stands for the proposition that plaintiff in a Title VII case can establish a *prima facie* case by comparing her salary with males in similar occupations, making reference to footnote 9 on page 890 of the Court's opinion, which states in part:

> "Likewise, in a situation where primarily women are employed in a type of job that is comparable but not substantially equal to that performed by men, an employer is free under the Equal Pay Act to decrease the wages of the women solely because of their sex. Such a practice is prohibited by the plain language of § 703 and will continue to be under our interpretation of the Bennett Amendment."

Any question as to whether the Court intended to adopt a "comparable work" standard under Title VII was disspelled by the Court's specific statements to the contrary in its decision denying rehearing:

> "Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a *prima facie* case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a

> similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases an equal work theory will provide the most practical method of establishing a *prima facie* case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible. We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a *prima facie* case."

Gunther v. *County of Washington*, 23 E.P.D. 15,649 at p. 15,654 (May 1, 1980).

While *Gunther* makes it clear that an employer cannot insolate itself from liability under Title VII by intentionally manipulating job content to avoid liability under the Equal Pay Act, or by admitting that he would pay a woman more if she were a man even though she is not performing work substantially equal to a man, it does not compell or even support a finding of liability with respect to the facts in this case.

I recommend the Court adopt the proposed Findings of Facts and Conclusions of Law filed herewith and grant defendant's Rule 41(b) motion. A proposed form of Order accompanies this Report of Special Master.

DATED this 23rd of October, 1980

Philip K. Sweigert
United States Magistrate
and Special Master

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C74-91S

MARGARET SPAULDING, *et al.*, *Plaintiffs*

vs.

UNIVERSITY OF WASHINGTON, *Defendant.*

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the undersigned, sitting as Special Master. The firm of Helsell, Fetterman, Martin, Todd & Hokanson has appeared as counsel for plaintiffs; the Office of the Attorney General of the State of Washington and Perkins, Coie, Stone, Olsen & Williams have appeared as counsel for defendant; the firm of Haverson, Strong, Moen & Chemnick has appeared as counsel for all intervenors, although pursuant to stipulation, intervenors took no active part in the trial proceedings. Plaintiffs' case was presented on May 21 through 31, 1979, and June 1, 5, 7, 18 and 19, 1979. At the close of plaintiffs' case defendant moved for involuntary dismissal pursuant to Fed. R. Civ. Proc. 41(b). I have considered all the evidence presented and the arguments of counsel, and being fully advised, make the following recommended findings of fact and conclusions of law:

I.
FINDINGS OF FACT

A. Parties

1. Plaintiffs are Margaret Spaulding, Myrna Joan Aavedal, Margaret Auld, Jeanne Benoliel, Carol A. Blainey, Rose

Bolin, Mary Boozer, Edna Brandt, Frances E. Briscoe, Pauline Bruno, Mary T. Bush, Evelyn I. Coombe, Diana M. Cowan, Ruth Craven, Mary Ann Draye, Joanna E. Fancher, Ruth Barney Fine, Catherine I. Fisher, Virginia Hafekorn, Shirley Harlow, Stella Hay, Barbara Innes, Margaret L. Larson, Anita L. Lendzion, Carolyn Livingston, Louise W. Mansfield, Pamela H. Mitchell, Helen Nakagawa, Maureen Niland, Barbara Marie Peterson, Rosemary J. Pittman, Janet Pitts, Susan B. Poulsen, Wanda Louise Shores, Muriel V. Standeven, Linda L. Waggoner, Alma Miller Ware, Reg A. Williams, and Vivian C. Wolf-Wilets. Plaintiffs are past and present members of the faculty of the University of Washington School of Nursing.

2. Intervenors are James Bush, Charlene Foster, Elaine Childs-Gowell, Susanna Lee Cunningham, Carol Jean Halpenny, Sharon Noriko Hirako, Kathryn A. Lee, Diane Marie Norkool, Joanne M. Rokosky, Jacqueline Holt Vandeman, and Susan A. Woods. Intervenors are also members of the faculty of the University of Washington School of Nursing.

3. The University of Washington ("University") is an agency of the State of Washington, created by act of the Legislature at RCW 28B.20.

B. Procedural History

4. On December 4, 1972, Margaret R. Spaulding, a member of the nursing faculty, filed a charge with the Equal Employment Opportunity Commission as chairperson of the "Women's Salary Inequity Committee." The charge alleged that the University discriminated against women on the school of Nursing faculty as a class in salary, promotions, appointments, and other terms and conditions of employment. The charge did not identify individual members of the "Women's Salary Inequity Committee."

5. The charge of the "Women's Salary Inequity Committee" was not investigated or conciliated by the EEOC.

6. On approximately February 8, 1974, the United States Department of Justice issued a right to sue letter to the "Women's Salary Inequality [sic] Committee, c/o Ms. Margret [sic] Spaulding."

7. Although the "Women's Salary Inequity Committee" as such did not file an action, on February 21, 1974, 76 members of the School of Nursing faculty filed this lawsuit alleging discrimination in pay, on account of sex, in violation of Title VII and 42 U.S.C. §1983. While other statutes were initially relied upon, they were waived or abandoned upon finalization of the pretrial order. All of the current plaintiffs were named plaintiffs in the February 19, 1974 complaint, but none of the intervenors were named. The lawsuit was originally filed as a class action.

8. On January 22, 1979, a stipulation and order was entered formally substituting the University of Washington as the named defendant in the action and dropping the suit against all individual defendants.

9. In February 1979, I orally advised the parties that I would permit the amendment of the complaint to include a claim under the Equal Pay Act, but that it would be inappropriate to permit plaintiffs to strike class allegations without making an effort to notify putative class members of plaintiffs' intention to strike the class action allegations.

10. On March 16, 1979, notice was sent to all identifiable potential class members, notifying them to present any objections they had to the proposed dismissal of the class action allegations on or before May 1, 1979.

11. Prior to the date for filing objections to dismissal of the class action, several persons filed statements commenting on the proposed deletion of the class allegations. A hearing was held on May 1, 1979. The court held that the class allegations could be dismissed, but that persons who filed objections to such dismissal could move to intervene. As a result, 11 persons filed a motion to intervene as plaintiff-intervenors and were represented by the firm of Halverson, Strong, Moen & Chemnick.

12. On May 21, 1979, the parties entered a stipulation permitting intervention by the 11 movants. By the stipulation the intervenors agreed to be bound by the court's determination of liability in the case and agreed that if a finding of no liability was entered against the principal plaintiffs the intervenors' claims would be dismissed with prejudice.

C. Organization of University of Washington and University of Washington School of Nursing

13. The University of Washington is the major research institution of higher education in the State of Washington. Historically the University has organized its faculty departmentally by academic discipline. Currently there are approximately 120 academic departments in the University. The departments comprise 16 independently organized schools and colleges, each under a separate dean.

The schools and colleges include: College of Arts and Sciences; College of Education; School of Pharmacy; College of Engineering; School of Law; College of Forest Resources; Graduate School; Schools of Business Administration; College of Fisheries; School of Medicine; School of Dentistry; School of Nursing; College of Architecture and Urban Planning; School of Social Work; School of Public Affairs; School of Public Health and Community Medicine.

14. The University's School of Nursing is divided into four departments; Maternal and Child Nursing; Physiological Nursing; Psychosocial Nursing; Community Health Care Systems. Each department has a chairperson who in turn reports to the dean of the School of Nursing.

15. The responsibility for initial faculty appointments generally resides in the faculty of a particular school or college. If a school or college is departmentalized and if the appointment is to a department level (other than as chairperson of the department), the chairperson of the department submits all available information concerning

the candidates to the voting members of the department faculty. Recommendations in favor of appointment, based on majority vote of the faculty, are sent with pertinent information to the appropriate dean. Some deans also have advisory committees of faculty. The faculty's recommendation will include the recommended entry level (instructor, assistant professor, associate professor, professor) for the candidate. If the dean concurs in the department recommendation, the dean transmits it and a starting salary figure, together with the vote of the department and the recommendation of the chairperson, to the president of the University. With few exceptions, the recommendation of the department and dean is accepted as a matter of course by the president of the University. There is no evidence that any recommendation regarding appointments in the School of Nursing have ever been refused or modified by the Board of Health Sciences or the president's office.

16. Procedures for promotion also are handled at the departmental level. The voting members of the appropriate department who are superior in academic rank to the person under consideration decide whether to recommend a candidate's promotion in rank. Promotions are based upon the attainment of scholarly and professional qualifications. Various schools and departments, including the School of Nursing, have their own criteria and procedures for promotions.

The chairperson of the department transmits the faculty's recommendation to the appropriate dean with the chairperson's own recommendation and any supporting data the dean may request. A committee or council of each college or school considers each promotion presented to it and submits its recommendation, with reasons therefore, to the dean. After receiving the recommendation of this committee, the dean decides upon the promotion; if the decision is favorable, it is transmitted to the president. Normally, the recommendation of the faculty and dean is routinely accepted by the president. There is no showing

that any recommendation of the faculty and dean of the School of Nursing has even been refused or modified by persons outside the School of Nursing.

17. In regard to salary increases the faculty of a school or college as a practical matter determines, within budget, the starting salaries and the amount of merit money increase each faculty member receives. The salary of each faculty member below the rank of professor is considered by the voting members of the department who are superior in academic rank; they recommend the salary increase which they deem merited. In arriving at the recommendation for salary decisions, the department faculty and their chairpersons study the record of the faculty member for scholarly and professional qualifications. The department chairperson transmits the faculty recommendation and his/her recommendation to the dean. The dean decides the appropriate amount of the merit increase and transmits the decision as a recommendation to the persident of the University. The salary recommendations of the faculty and deans are normally accepted as a matter of course by the president. Various schools and colleges adopt their own procedures and standards for the evaluation of their faculty member's merit. The School of Nursing has its own formal merit evaluation procedures and standards. There is no evidence that any merit salary increase in the School of Nursing recommended by the faculty and dean has ever been rejected or modified by persons outside the School of Nursing.

18. The central University's role in faculty salary administration is primarily in determining the percentage increase to go to each school and college after the state Legislature has made a general salary allocation to the entire University. Since 1972, the Legislature has funded the following percentage increases in faculty salaries:

Effective Date	Percentage Increase
9/1/72	3%
2/1/73	($40/month)
7/1/73	10.5%
3/1/75	12%
7/1/76	5%
7/1/77	10%
7/1/78	5%

The percentage increase is a percentage of the sum of the current salaries for all state-funded faculty positions.

19. The University Budget Committee allocates the amount funded by the Legislature to the University's schools and colleges. A portion of the allocation is normally made as an across-the-board increase for each faculty position in every school and college. The remainder is allocated—sometimes in varying percentages—to the schools and colleges for distribution at their discretion to their faculty.

20. Since 1972, the salary increases authorized by the University Budget Committee for each school or college have been:

	9/1/72	2/1/73	7/1/73	3/1/75	7/1/76	7/1/77	7/1/78
ACROSS-THE-BOARD INCREASES FOR ALL FACULTY:	—	$40/MO/FTE	3.5%	5%	2%	3%	—
ADDITIONAL INCREASES ALLOCATED AT DISCRETION OF RECIPIENT:							
General University							
Arch. Urban Urban Plann.	3%	—	7.2%	6.5%	3%	7%	5%
Arts & Sci.	3%	—	7.2%	7.5%	3%	7%	5%
Bus. Admin.	3%	—	9.2%	7.5%	3%	7%	5%
Education	3%	—	7.2%	7.5%	3%	7%	5%
Engineering	3%	—	9.2%	10.5%	3%	7%	5%
Fisheries	3%	—	7.2%	9.5%	3%	7%	5%
Forest Resources	3%	—	7.2%	6.5%	3%	7%	5%
Graduate School	3%	—	7.2%	6.5%	3%	7%	5%
Law	3%	—	12.2%	10.5%	3%	7%	5%
Public Affairs	3%	—	7.2%	6.5%	3%	7%	5%
Social Work	3%	—	8.2%	6.5%	3%	7%	5%

Health Sciences							
Dentistry	3%	—	7.2%	8.5%	3%	7%	5%
Medicine	3%	—	7.2%[1]	6.5%	3%	7%	5%
Nursing	5%	—	9.2%	8.5%	3%	7%	5%
Pharmacy	3%	—	7.2%	6.5%	3%	7%	5%
Public Health & Community Medicine	3%	—	7.2%	6.5%	3%	7%	5%

[1]Clinical medicine departments received an additional 12.2% allocation.

21. Once salary increase money is allocated to a particular school or college, the portion designated "across-the-board" by the University Budget Committee is distributed to each faculty member and the portion available as "merit funds" is divided among faculty members as described in Finding of Fact 17 above. "Merit funds" may be allocated by a school or college as determined by the faculty and dean. Thus a particular school or college may determine to allocate all or part of the merit pool to the faculty on a straight "across-the-board" basis, or on the basis of individualized merit evaluations, or on some combination of merit and across the board. In reporting to the central administration regarding what has been done with merit funds, the school or college may simply indicate "merit increase," even when the money has been distributed across the board.

D. Background and Issues of Suit

22. Historically, throughout the United States nursing has been considered a separate and distinct discipline. Nurses themselves recognize their profession as a separate discipline. This identification is based upon the training, expertise, emphasis, subject matter, and content of nursing. Nursing is viewed as its own profession. This self-identification stems from the same types of factors that have led other disciplines to be separate and distinct and is not based upon sex discrimination.

23. The School of Nursing at the University of Washington has been an independently organized school since 1945.

Although the nursing faculty applies the same general criteria for appointment, promotion, and tenure (teaching, research, publication, and community service), as the remainder of the University it has set its own standards for interpreting and applying the general criteria.

24. Nursing has not been as research or academically oriented as have other disciplines at the University. It began to move seriously toward a greater research and academic base in the mid-1960s in connection with a federally sponsored nurse-scientist program.

25. Although the nursing profession has not traditionally had its own Ph.D degree, a Ph.D degree or equivalent doctoral preparation in some other discipline has been sought after and recognized as the "terminal degree" in nursing since at least the 1960s. With the increased emphasis in nursing on research and academic pursuits in the mid-1960s, increased emphasis was placed upon possession of a doctoral equivalent degree in appointment, promotion, tenure, and salary decisions at the University of Washington's School of Nursing. This evolution was part of a general pattern in the nursing profession throughout the country.

26. Since the late 1960s there has been a continuing growth in the percentage of doctorally prepared faculty on the School of Nursing faculty.

27. On March 14, 1972, many members of the faculty of the School of Nursing filed a petition alleging sex discrimination with Dr. Solomon Katz, Vice President for Academic Affairs and Provost of the University of Washington. It was filed on behalf of the women faculty of the School of Nursing. All plaintiffs to this current suit signed the petition with the exception of plaintiffs Reg Williams and Ruth Fine. None of the intervenors in this action signed the petition. The petition was designated "Petition of the School of Nursing Faculty Women."

28. The only issue raised in the petition which has been pursued in the instant suit was the allegation that the

School of Nursing faculty women did not receive salary parity with male faculty members at the University.

29. The petition designated eight faculty members to serve as representatives of the petitioners in trying to resolve the concerns raised in the petition.

30. Prior and subsequent to the petition, the University provided certain salary data to the petitioners and their representatives. In addition, on March 26, 1976, Dr. Thomas Grayston, Vice President of the Health Sciences Center, and Dr. Katz met with designated representatives of the petitioners to discuss the issues raised in the petition.

In regard to the allegation of salary inequity, the University representatives advised the petitioners that it was not appropriate to compare one discipline's average salary with the composite average salaries of all faculties at the University. (This was the approach taken by the nurses in their petition.) Rather, the University pointed out that each discipline commanded its own salary levels depending upon the academic marketplace for that discipline.

Drs. Grayston and Katz indicated that they would request a more sophisticated study of salaries in the School of Nursing to determine whether the salaries at the School of Nursing were further out of line with other schools of nursing, then other disciplines at the University were when measured against their comparators at other colleges and universities.

31. In late May, 1972, Dr. Katz wrote a letter to Dr. Grayston. In this letter he advised Dr. Grayston that an additional $16,000.00 would be made available to the nursing faculty if such supplemental funds were warranted.

32. On May 23, 1972, the University's Budget Office completed an analysis of the School of Nursing salaries. This study showed that the University of Washington's salaries, as a whole, lagged 9% behind those schools against which the University's salaries had traditionally been

compared. The study also concluded that the School of Nursing's average salaries lagged 10.9% behind comparable schools of nursing but that many other disciplines experienced as great or greater lag.

33. In September, 1972, all of the schools and colleges at the University of Washington were alocated a 3% merit increase pool. The only exception was the School of Nursing, which received a 5% merit pool increase. The purpose of the 2% additional funding was to bring the School of Nursing faculty average to the same "average deficit" as the general University general deficit.

34. The University of Washington, as a whole, has traditionally lagged behind comparable universities in terms of its salary scale. This lag is not at all unique to the School of Nursing. The University attempts to keep its salaries in each discipline competitive with the national academic marketplace for each discipline. There is no evidence that the lag in the salaries of the School of Nursing when compared with comparable schools of nursing has anything to do with the sex of the faculty members of the School of Nursing; rather it appears to be a reflection of a normal pattern of lag that has been experienced throughout the University, regardless of discipline or the sex of the faculty members within a particular discipline.

35. As Finding of Fact 20 further indicates, the School of Nursing faculty received supplemental merit money on July 1, 1973 and March 1, 1975, which were the next two dates upon which merit monies were made available to the University of Washington. There is no showing that the salaries in the School of Nursing are further behind than are the salaries of other disciplines at the University when compared with their counterparts among the universities with which the University of Washington has traditionally compared itself.

36. Through the summer and fall of 1972, several meetings were held by persons on the School of Nursing faculty to

discuss the status of the petition and related issues. Apparently no formal minutes were kept of these meetings, and there is no indication who participated or otherwise continued to express interest in the petition.

37. On November 27, 1972, a memorandum to members of the nursing faculty was distributed by a group entitled the "Women's Salary Inequity Committee" ("Committee"). It asked faculty members formally to sign a card and express their alliance with the Committee. On November 29, 1972, the Committee sent a letter to the Office for Civil Rights of the Department of Health, Education, and Welfare, charging the University with violations of various executive orders. This letter was signed by the "Women's Salary Inequity Committee and Margaret R. Spaulding, Chairman." Eleven persons were listed as the members of the Committee, including eight of the current plaintiffs: Spaulding, Aavedal, Bolin, Spietz, Poulsen, Pittman, Standeven, and Waggoner.

38. At the same time the Committee filed a complaint with the Washington State Human Rights Commission, a state agency chartered to enforce the state discrimination law. The same 11 persons were identified as the members of the Committee.

39. On December 4, 1972, the Committee filed a charge with the EEOC. The only member of the Committee who was specifically identified was Margaret Spaulding.

There is no record or recollection of which faculty members, if any, responded to the Women's Salary Inequity Committee's November 27 solicitation. The only plaintiffs actually identified as members of the Committee are the eight listed in Finding of Fact 37 above. Apparently some other faculty members participated at other times in the Committee's efforts, but there is no evidence regarding the degree or consistency of their involvement.

40. In the spring of 1973, the Women's Salary Inequity Committee filed a charge with the University of Washington's Human Rights Commission. During the next several months,

the petitioners and the University attempted to develop supplemental information for the purposes of a hearing before the University of Washington's Human Rights Commission.

41. At trial, plaintiffs complained that the University did not provide all of the information they sought and did not otherwise cooperate in bringing the case to hearing. I find that the University did not unreasonable respond to the charge before the University of Washington Human Rights Commission. Although there were disagreements between the parties as to the scope of the information that should be made available to the faculty and the responsibility of the University for the development of the same, there is no evidence that these disagreements were other than bona fide differences of opinion as to the scope of the request for information and its relevance. There is no evidence that the University's responses were related to the sex of the petitioners, nor can any inference be drawn that such response reflected a discriminatory animus.

42. On February 21, 1974, the instant suit was filed.

D. Findings Regarding Specific Elements of Plaintiffs' Claims

(a) Claim: That Plaintiffs Do Substantially Equal Work.

43. Plaintiffs are or were qualified to teach at the School of Nursing by virtue of their training and experience in the field of nursing.

44. The content and emphasis of the courses or parts of courses which plaintiffs have taught at the School of Nursing and the research in which they have been involved are in the field of nursing.

45. Training and experience as a nurse are requirements for faculty positions at the School of Nursing. All plaintiffs had such training and experience. Training and experience as a nurse do not qualify plaintiffs as faculty members in other disciplines at the University.

46. Plaintiffs alleged that they were doing work substantially equal to that done by certain male faculty members in other departments—Health Services, Architecture, Urban Planning, Environmental Health, Social Work, Pharmacy Practice, Speech and Hearing, and Rehabilitative Medicine. Plaintiffs did not introduce any evidence sufficient to show that the duties and responsibilities involved in the performance of their jobs was substantially equal to those performed by the individual named comparators in other departments. Many of the individual "comparators" in these departments were never even mentioned during the course of trial.

47. To the extent evidence was introduced which indicated generally what faculty jobs in the named comparator department entailed, I find that such jobs are not substantially equal to the work performed by plaintiffs. At best, plaintiffs have established that they teach and prepare various courses in nursing, do research and publish in the nursing field, work on various committees and advise students and that the comparator males do the same types of things in their schools and departments and in their areas of expertise. All of the activities of a faculty member are premised upon his or her disiciplinary knowledge and expertise. As a result, the teaching, publication, research, and community service that are required by each discipline involves the need for different skills and a different emphasis upon the various aspects of the faculty member's job performance. Plaintiffs have established only that the work that they perform in teaching at the University is, broadly speaking, comparable to that performed by all those teaching at the University, in that all teachers do research and publish in their respective fields.

48. Faculty members in the various named departments work as and are recognized as separate professional groups.

49. Different disciplines have their own unique body of knowledge and expertise, and different departments and disciplines within the University place different emphasis

on relative importance of various aspects of the job performance, such as research, teaching, and community service.

50. Plaintiffs offered evidence which showed that some plaintiffs and other faculty are involved in some interdisciplinary teaching and/or research. Faculty doing interdisciplinary work bring the special skills of their discipline to the various projects. Such evidence is not sufficient to establish that faculty engaged in interdisciplinary teaching are all performing substantially equal work.

51. Plaintiffs have not contended that male and female faculty members within the School of Nursing are treated differently with regard to salary, promotion or tenure. The evidence presented by plaintiffs indicates that male and female faculty members in the School of Nursing are treated the same.

52. None of the plaintiffs alleged nor offered any evidence that they had been denied faculty positions at other departments or schools at the University of Washington.

(b) Claim: That the University Uses the "Market Value" of Discipline as a Subterfuge or Pretext for Discriminating Against Nurses.

53. The University of Washington competes in a national market for its faculty members along with other major academic institutions. One of the factors which is considered in setting individual salaries is the wage level at other comparable institutions for persons within a particular discipline or subspecialty. Different disciplines command different general salary ranges regardless of the sex of the particular faculty member. Such market considerations relate to discipline, not to sex.

54. The University could not ignore market pressures and continue to attract the quality of personnel needed to maintain it. The University is as competitive in the market for nursing faculty as it is, on average, with other disciplines. There was absolutely no evidence that the University's re-

liance on market place factors was pretextual and/or used for the purpose of discriminating against nursing faculty because of sex.

55. The University of Washington School of Nursing has been able to maintain a quality faculty at the salaries it has been paying. Plaintiffs have not shown that the School of Nursing has had any more difficulty in maintaining the level of quality of its faculty than any other school or department at the University. In fact, the evidence indicates that the School of Nursing has been able to upgrade its faculty at the salaries it was paying.

56. The law of supply and demand is an important factor at any given point in time in determining salary levels that a given expertise or discipline may command. The University bases the salaries paid to its faculty members on competitive market values, not sex.

57. The evidence presented indicates that the University has sought to pay each discipline's faculty equitably as between themselves and as compared to faculty at other institutions.

58. The University administration and the faculty senate have at various times instructed the schools and colleges to make "equity adjustments" and made money available for such adjustments. The methodology used to make such adjustments between faculty within a school or department was to have the faculty rate (rank order) their peers in terms of merit and then to make sure that salaries corresponded to those rankings. "Equity adjustments" were made where salaries were out of line. The University also, as part of the same procedure, sought to make sure that females and minorities were being treated equally. The School of Nursing made such equity adjustments to its faculty salaries.

59. The University attempts to make comparisons with other institutions to determine if salaries in any particular school or college are relatively further behind than are the

University's other schools or colleges. Where particular schools have fallen significantly further behind than the rest of the University, when funds became available additional funds have been allocated to that school. At various times since 1970, such differential allocations have been made to various schools including the School of Nursing. In terms of the allocation of funds the University has treated the School of Nursing as well as or better than it has treated the other schools at the University.

60. The University of California system was cited by plaintiffs as the primary example of research-oriented institution which does not rely on market forces by discipline in setting salaries. The evidence does not support plaintiffs' contention. The University of California's step scales take into account the same types of market considerations in determining individual salaries as does the University of Washington.

61. In the University of California system there are eight different salary scales for acting faculty, including separate scales for the Law School, the Dental School, the School of Veterinarian Medicine and the Biological Sciences at the Medical School.

62. The market for faculty in a particular field or subfield at any given time will affect rank and step at which faculty are hired and therefore the salary which they will be paid at the University of California. Market factors play a role in developing the step scale and in determining what rank and step a particular faculty member will be hired at as well as what raises a faculty member will receive. Off-scale and above-scale salaries are also used to deal with market pressures. There is sufficient flexibility with the use of off-scale appointments, with the ability to bring faculty in at different ranks and steps, and with variable rates of promotion for the University of California to accommodate market conditions.

63. There is no showing that the salary system employed

at the University of California is any less likely to result in sex discrimination than that used by the University of Washington.

64. I believe that the nursing profession in general is probably undervalued in terms of its relative worth to society. One of the reasons for this is because nursing has historically been dominated by women. I cannot say, however, that it is undervalued in regards to the disciplines plaintiffs have chosen as comparators. Neither can I determine or evaluate the extent of the impact on nursing salaries of society's historical attitudes. There are many other complex factors which have impacted the societal valuation of nursing skills. It is impossible to isolate or evaluate the role of sex in the process.

(c) Claim: That Ruth Fine was Discriminated Against.

65. Ruth Fine was employed by the University of Washington Hospital from 1958 to 1976.

66. At the time of the EEOC charge she was Director of Nursing Services at the hospital. Sometime thereafter the title Associate Administrator was added to her primary title of Director of Nursing Services. All her salary and benefits were paid by the hospital.

67. At that time, she also had a nontenured "appointment" without salary with the School of Nursing.

68. Ms. Fine was first paid a salary by the School of Nursing in the 1976-77 school year. Since 1976, her sole position at the University has been an associate professor in the School of Nursing. She holds a Master's degree in nursing.

69. Ms. Fine's work has been compared to that of Edward Stein and Geoffrey Lange.

70. Geoffrey Lang was an assistant administrator at Harborview Medical Center in 1969. From 1971 to the

present, Lang has been an associate administrator at Harborview. He holds a Master's degree in public health.

71. Mr. Lang at most of the relevant times was paid a lower salary than Ruth Fine.

72. Mr. Lang and Ms. Fine did not perform substantially equal work in terms of skill, effort, and responsibilities. Ms. Fine was Director of Nursing and also had responsibility for some clerical units. Ms. Fine's primary responsibility, however, was as supervisor of nursing personnel at the University Hospital. Mr. Lange had hospitalwide responsibilities, was responsible for several hospital departments, was in charge of labor negotiating and had a major role in hospital planning. Mr. Lang was responsible for administering departments which were greater in number and complexity than those for which Ms. Fine had responsibility. He assumed complete responsibility for administration of Harborview in the absence of the administrator.

73. Mr. Stein was an associate administrator at the University Hospital from January, 1974 to March, 1978, and acting administrator of the hospital from March through June, 1978. He holds a Master's degree in business administration.

74. As an associate administrator, Mr. Stein was the second in command at the University Hospital. When the administrator of the hospital was ill or on vacation or otherwise unavailable Mr. Stein served as acting administrator of the hospital. Mr. Stein's responsibilities were hospitalwide. Mr. Stein had primary administrative responsibility for professional services in 20 departments including outpatient clinics, pharmacy and kidney dialysis. He also coordinated hospital planning and budgeting.

75. I find that Mr. Stein and Ms. Fine were not performing substantially equal work in terms of skill, effort and responsibility.

E. Miscellaneous Matters

(a) Use of the Instructor Rank in School of Nursing.

76. The decision to hire faculty at the instructor rank is made by the faculty and the dean of the School of Nursing itself and as a practical matter is totally within their control. In order to be hired at the School of Nursing at the instructor rank, a person need not have any prior teaching experience, any published research or any outstanding professional accomplishments. Instructors at the School of Nursing including many of the plaintiffs, were hired as instructors immediately after they obtained their Master's degree in nursing, a nonterminal degree, with no prior relevant experience other than as a staff nurse (entry level nursing positional at a hospital). There is no showing that other disciplines hired persons of similar backgrounds at higher ranks. In fact the testimony indicated that other disciplines would normally hire persons of this background as teaching assistants, a nonfaculty rank.

77. The School of Nursing does not hire any doctorally prepared faculty at the rank of instructor.

78. Plaintiffs have not shown that the School of Nursing is hiring faculty at the instructor rank with job-related qualifications equal to faculty members in other schools and colleges at the University who were hired at the rank of assistant professor. I find that there are legitimate nonsex-related differences which would justify treating plaintiffs who were hired at the instructor rank differently than assistant professors and associate professors in the comparator departments.

79. Use of the instructor rank as a starting rank for inexperienced, nondoctorally prepared faculty is characteristic of the nursing profession throughout the country. This has nothing to do with the sex of a particular applicant. It is a professional criterion.

80. Of the thirty-nine plaintiffs only three were doctorally

prepared when hired by the University. All were hired as assistant professors.

(b) Plaintiffs' Statistical Methodology.

81. The statistical reports generated by Messrs. Sutton and Toner are not reliable and, even if reliable, would not establish substantial equality of work or properly evaluate legitimate reasons for salary differentials. For example, in regard to statistical reliability plaintiffs' entire data base and analysis was premised upon the proposition that the "remarks" section of the President's record cards properly distinguished between across-the-board increases and merit increases. Testimony and exhibits established that the cards were totally inaccurate in this regard. The information contained in plaintiffs' computer base was inconsistent with their theory. In regards to the question of whether plaintiffs' computer runs appropriately measured legitimate reasons for salary differntials, one major defect was that the system totally ignored legitimate job experience prior to employment at the University. The statistical analysis was also deficient in that the "comparator men" were selected without any reference to the actual work they were doing. The court could not determine from the computer materials, even when coupled with testimony, the actual day-to-day responsibilities and work of the male comparators.

(c) Ph.D Program for School of Nursing

82. Plaintiffs alleged that the way in which the Graduate School treated the School of Nursing's proposal for Ph.D program was discrimination against the School of Nursing. The plaintiffs failed to show that the Nursing School's Ph.D proposal was treated any differently than any other Ph.D proposals submitted by other schools and departments.

(d) Affirmative Action Programs for Women.

83. Plaintiffs alleged that the University failed to adequately staff and fund agencies designed to improve the status of

women and that this evidences discriminatory intent. I find that the University did, during the relevant time period, work towards improving the status of women at the University.

(e) Utilization of Women in Administration.

84. Plaintiffs alleged that the University's failure to have more women administrators evidences discrimination against women. Plaintiffs have failed to show that the University underutilized women in administrative positions. Plaintiffs failed to introduce any evidence on the availability of women administrators. At all times relevant to this suit the University did have women in central administrative positions. There is no showing that any woman was precluded from filling a position because of her sex.

II.
CONCLUSIONS OF LAW

1. Since it is not necessary to rule on the issue, this court assumes that it has jurisdiction over the parties and the subject matter of this suit under Title VII, the Equal Pay Act, and 42 U.S.C. §1983.

2. The sole issue as framed during the pretrial proceedings and throughout the cause of this litigation was whether any one or all of the plaintiffs have been discriminated against with regard to their salary on the basis of sex.

3. In order to prove a case under the Equal Pay Act, plaintiffs must prove that an employer is paying different wages to employees of the opposite sex for substantially equal work, the performance of which requires substantially equal skill, effort, and responsibility. Plaintiffs have not shown that they are performing work substantially equal to any of the comparators they have named. Plaintiffs have shown no violation of the Equal Pay Act. In enacting the Equal Pay Act Congress never intended that jobs and professions which have historically and normally been considered different be compared.

4. In order to prove a case of salary discrimination under Title VII, although not necessarily required to establish the performance of substantially equal work as required under the Equal Pay Act, *Gunther* v. *County of Washington*, 602 F.2d 882 (9th Cir. 1980), *rehearing denied*, 23 E.P.D. 15,649 (1980), plaintiffs must establish discrimination in salary on the basis of sex and, without more, a showing that the teaching work done by plaintiffs is in a broad sense comparable to the teaching work done by faculty in other departments of the University is insufficient to establish a *prima facie* violation of Title VII. In enacting Title VII, and in particular the Bennett Amendment, Congress did not intend to substitute a "comparable work" standard in establishing a claim of discrimination in compensation under Title VII.

5. Likewise, a salary discrimination action brought under 42 U.S.C. § 1983 is not established by a showing of such comparability, and in addition, plaintiffs must establish a discriminatory animus or motive. There is no showing of discriminatory intent or motive in this case.

6. The Legislative history under the Equal Pay Act and under Title VII establishes that Congress never intended to prevent differences resulting from the fact that one group of employees, consisting of both males and females receive less pay than another group also containing both males and females so long as all employees within the group are treated equally and so long as the job classification system is not itself discriminatory or maintained as a pretext for discrimination. There is no showing in this case that the classification of faculty by department and academic discipline is other than legitimate and historically accepted, nor is there any evidence it is maintained as pretext for discrimination.

7. It is not illegal under Title VII or the Equal Pay Act for a salary differential to exist between different jobs or professions, even though by some standards those jobs

may be of comparable worth to society and even though the under evaluation of a job or profession may be in part due to historical societal discrimination.

8. Plaintiffs' statistical evidence is insufficient to establish that plaintiffs were victims of sex discrimination.

9. Although defendant is the prevailing party in this action under § 706(k) of Title VII, there is no showing that plaintiffs' action was baseless or frivolously brought or maintained, and no attorneys' fees should be awarded.

10. This action should be dismissed with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

DATED this 22d day of October, 1980.

Philip K. Sweigert
United States Magistrate
and Special Master

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C74-91S

MARGARET SPAULDING, *et al.*, *Plaintiffs*

vs.

UNIVERSITY OF WASHINGTON, *Defendant.*

MOTION TO DISMISS ORAL DECISION

Court's Oral decision in the above-entitled and numbered cause, before the Honorable Philip K. Sweigert, a United States Magistrate, on June 20, 1979.

APPEARANCES:

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ORAL DECISION

THE COURT: Ladies and Gentlemen, I am going to recommend that a judgment of dismissal be entered for insufficiency of evidence under Rule 41(b) as to all plaintiffs, including Ruth Fine.

I guess to be specific, Mr. White, with respect to your question number one, at least as it relates to plaintiffs other than Ruth Fine, I think the answer is, yes.

This is a salary discrimination case. It is not a class action case involving across the board discrimination against women faculty at the University of Washington.

The sole issue is whether any one or all of the 39 plaintiffs have established that the University of Washington discriminated against them with regard to their salaries solely on the basis of their sex under applicable legal standards.

What are the applicable legal standards? Plaintiffs have alleged causes of action under Title VII, the Equal Pay Act, and 42 United States Code, Section 1983.

First, I am satisfied that the Equal Pay Act standards apply with respect to the Title VII claim. The legislative history clearly supports that conclusion, and so do the great majority of the cases that have considered the question.

Probably the best analysis of that issue is in the *IUE v. Westinghouse* case. I am equally satisfied that Section 1983 requires no lesser standard and, indeed, requires a showing of actual discriminatory animus or motive. Therefore, I conclude that plaintiffs must establish liability, if at all, under Equal Pay Act standards.

The Equal Pay Act requires that each individual plaintiff establish equal work, and unequal pay premised on sex. Specifically, plaintiffs, other than Ruth Fine, must prove that their work at the University of Washington as faculty members of the School of Nursing is substantially equal to that of the males they have chosen for purposes of comparison, who are faculty members in other schools and departments of the University, including the schools and departments of the University, including the schools of Pharmacy, Public Health, Architecture, Urban Planning, Social Work, and others. Moreover, they must show that the work performed requires equal skill, effort, and responsibility. A showing of comparability or, indeed, similarity is not sufficient. Further, differences based on experience and training preclude liability to the extent that the different training and experience are required in the performance of the work.

I believe it clear from the legislative history under the Equal Pay Act that jobs and positions that have historically and normally been considered to be different are not to be compared.

The Civil Rights statutes do not create a remedy for salary differentials between different professions or areas of expertise, even though the values placed upon those professions and areas of expertise may be due, in part, to outdated and discriminatory notions of capabilities and worth of the sexes.

The Courts are not to make value judgments as to the worth of various jobs and professions. That is the very reason, I believe, that Congress declined to adopt a comparability standard and adopted an equality standard instead.

What showing has been made by the 38 plaintiffs, other than Ruth Fine? Virtually no evidence that would permit this Court to make a finding of substantial equality. Throughout the testimony, more often than not, teaching in the School of Nursing was described in terms of

comparability or similarity. At best, plaintiffs have established that they teach and prepare various courses in nursing, do research and publish in the nursing field, work on various committees, advise students, et cetera, and that the comparator males do the same types of things in their schools and departments and in their areas of expertise. But it is equally clear from the testimony that each different discipline has its own unique body of knowledge and expertise, and that even different departments and disciplines within that University place different emphasis on relative importance of various aspects of the job performance, such as research, teaching, and community service.

Testimony also makes it clear that the law of supply and demand is still an important factor at any given point in time in determining salary levels that a given expertise or discipline may command.

I cannot find from the evidence that faculty teaching in the School of Nursing, whose training and expertise and teaching is inextricably tied to the body of knowledge which is peculiar to them, are doing substantially equal work as those whose training and teaching are in entirely different disciplines. It's like comparing apples and oranges, a phrase which, I think, was used earlier this morning in argument.

To say simply that they are all teachers is, indeed, an oversimplification. Society has historically treated the separate disciplines and professions as being different, and Congress never intended such interdepartmental—or interdisciplinary comparisons to be made under the Equal Pay Act.

Certainly plaintiff has established the existence and encouragement of interdisciplinary programs at the University, but that does not establish, in my mind, equality with respect to the work of the different professions involved.

A further problem in the case was presented by the fact that although the School of Nursing is predominantly female, there are male faculty in the department, including one of the plaintiffs here. Plaintiffs attempt to compare themselves with comparator departments and schools which are also composed of both male and female faculty. I believe that the legislative history under the E.P.A. establishes that Congress never intended to prevent differences resulting from the fact that one group of employees, consisting of both males and females, receive less pay than another group also containing both males and females, so long as all employees within the group are treated alike, and I refer to the *Burmaster* case.

There has been testimony that nursing is undervalued, as it has been historically a predominantly female profession. I believe that the evidence does establish that societal discrimination is *one* of the reasons for such undervaluation.

Plaintiffs position is that the University's reliance on such market for nurses and, in particular, nurses in academia, and its practice of comparing faculty in the School of Nursing and their salaries to those of other Schools of Nursing perpetuates that past discrimination.

The cases, however, clearly establish that such societal discrimination is not sufficient to establish liability under the Civil Rights statutes here involved. There must be a discriminatory act by the University of Washington, other than its reliance on legitimate market differences between professions which may, in part, reflect societal discrimination. I rely on the *Tacoma-Pierce County* case and the Federal cases cited therein; *Christensen*, *Ammons*, and *Orr*.

As to plaintiff Ruth Fine, she has the burden of establishing that her job as Associate Adminstrator and Director of Nursing at University Hospital is substantially equal to the position occupied by Mr. Stein, but that she was paid less. Lang is not an appropriate comparator, because Ms. Fine's pay was more than his. While Ms. Fine and Mr. Stein

had, in part, the same job title, the job content was *not* substantially equal and neither was their education and training.

What I am going to ask both sides to do is to prepare proposed findings and conclusions in this case to be presented to me, at which time I will amalgamate them, and come up with my own proposed findings and conclusions. I will then prepare a report and recommendation recommending that a judgment of dismissal with prejudice be entered, and then the matter can proceed from there.

Because of the length of the testimony, I would hope that 30 days would be sufficient for you to submit your findings.

Again, it is always a very difficult thing to consider and rule on a motion of this kind in a case of this kind, but I believe the trier of fact must do what he feels to be correct. I anticipate that there will be an appeal, and I would think that there may be sufficient legal question involved in this area to certainly justify that. I have enjoyed working with all counsel. Both sides did an exceptional job of preparation. Argument this morning was tremendous. We may not have seen the last of the case certainly.

Again, thank you, and the Court is going to be in recess.

(Whereupon, the Court's Oral Decision on Defendants' Motion to Dismiss was concluded.)

APPENDIX F

Article III, Section 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance of Office.

28 U.S.C. § 636 provides:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> (1) all powers and duties conferred or imposed upon United States District Courts:
>
> (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions, and
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (b)(1) Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisidiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be

construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests. (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court. . . .

29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: PROVIDED, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of

employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-5(f)(5) provides:

It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, the judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedures.

Fed. R. Civ. P. 41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until

the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 53(b) provides:

Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of the subdivision.

Fed. R. Civ. P. 53(e)(2) provides:

In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be made by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.